generated have consistently been found to not be testimonial.[67] An example of fully computer-generated records would be a billing statement.[68] Subsequent courts have differentiated between computer-generated and computer-stored records holding that while computer-generated records are not testimonial computer-stored records are.[69] Reports derived from information in computer-generated records may become testimonial, even if the underlying log may not be.[70] In *United States v. Cameron*, Yahoo! used automated monitoring to identify potentially illegal files.[71] Once a suspected account was identified, a report with the user's information was compiled and sent to the National Center for Missing and Exploited Children (NCMEC) for investigation and potential prosecution.[72] The court in *Cameron* found the report to NCMEC to be testimonial and outside of the business records exception, as such the Yahoo! analyst would be required to testify for the report to be admissible.[73]

Recent advancements have gone a long way to support a defendant's right to cross-examine an accuser who has generated a report to be used in litigation.[74] These advancements though do not address issues of credibility related to the underlying data being testified about.

**Federal Rules of Criminal Procedure: Rule 16 Discovery**

The use of investigative software by law enforcement has not only raised issues of constitutionality, but additionally directly challenges the discovery standard of criminal procedure.

In accordance with the U.S. Constitution every defendant is entitled to due process and to confront the evidence and witnesses against them.[75] As a matter of due process, a defendant must be aware of the charges against them, the evidence to be presented, and the existence of any evidence that could be exculpatory.[76] Failure by a prosecutor to disclose such evidence is grounds for a reversal of the conviction.[77] For federal trials, the disclosure of evidence is governed by Rule 16 of the Federal Rules of Criminal Procedure.[78] Specifically, Rule 16 states in part:

---

[67] *See* United States v. Lamons,532 F.3d 1251, 1263 (11th Cir. 2008); United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008); United States v. Washington, 498 F.3d 225, 230 (4th Cir. 2007); United States v. Hamilton, 413 F.3d 1138, 1142 (10th Cir. 2005); United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003).
[68] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[69] Commonwealth v. Royal, 89 Mass. App. Ct. 168 (2016).
[70] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[71] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[72] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[73] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[74] United States v. Cameron, 699 F.3d 621 (1st Cir. 2012).
[75] U.S. Const. amend. V, VI.
[76] Brady v. Maryland, 373 U.S. 83 (1963).
[77] Brady v. Maryland, 373 U.S. 83 (1963).
[78] Fed. R. Crim. P. 16(a)(1)(E)(i).

> *"Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant."*[79]

Additionally, the intent and purpose of Rule 16 must be assessed to ensure appropriate application. The purpose of Rule 16 is to allow for discovery when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[80] The intent of Rule 16 is to "avoid[]…an unfair trial to the accused."[81] Determinations of discovery should fall in favor of the defendant unless otherwise determined.

Defense attorneys, as part of their request for production, include requests for all data, source code, and manuals related to the Government's investigative software that served as the sole basis of probable cause and being proffered as evidence of guilt.[82] Attorneys are met with denials and claims that the requested materials are not material and furthermore are protected by the "law enforcement privilege."[83] As previously highlighted, the government is aware of the high risk that their software could be found unreliable and considered a "magic black box" very similar to the results of successful investigation into breathalyzers.[84] Thus, when the government is ordered to disclose the software it elects to drop the charge in an effort to prevent any form of inspection.[85]

In the event of a denial, an attorney has the available remedy of petitioning the court for an order to produce through the use of a motion to compel and for independent examination.[86] Judges hearing such motions are provided wide latitude in decisions of discoverable evidence.[87] Courts across the country are split on whether to compel the production of investigative software for examination.[88]

---

[79] Fed. R. Crim. P. 16(a)(1)(E)(i).
[80] United States v. Bagley, 473 U.S. 667, 682 (1985) (discussing the *Brady* materiality standard).
[81] Brady v. Maryland, 373 U.S. at 87.
[82] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[83] Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).
[84] Florida v. Conley, No. 48 - 2012 -CT-000017- A / A (Orange County, FL September 22, 2014)
[85] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[86] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019).
[87] United States v. Hintzman, 806 F.2d 840, 846 (8th Cir. 1986).
[88] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012); United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).

The 9th Circuit supports this while the 6th Circuit has denied such a motion.[89] However, other circuits have begun to hear similar arguments.[90] The arguments and outcomes have relied heavily upon the Court's interpretation of "materiality." Relying on *Mooney* and *Pyle*, the Court in *Brady* established the "material" requirement reflected in Rule 16 to "avoid[]…an unfair trial to the accused."[91]

The Eighth Circuit defines "material" information for purposes of Rule 16 as information that is "helpful to the defense."[92] However, a showing of materiality requires more than "a mere conclusory allegation" of the requested information's materiality.[93]

In the 9th Circuit case *US v. Budziak* law enforcement used a modified version of a peer-to-peer file sharing software to download files from an IP address they believed was distributing child pornography.[94] In his motion to compel, forensics experts "presented evidence suggesting that the FBI may have only downloaded fragments of child pornography files from his 'incomplete' folder, making it 'more likely' that he did not knowingly distribute any complete child pornography files to [the FBI]."[95] Budziak also presented "evidence suggesting that the FBI agents could have used the EP2P software to override his sharing settings."[96] The 9th Circuit found this evidence to be sufficient to establish materiality.[97] Cases such as *United States v. Crowe* have followed, also granting the motion to compel based on an expert's testimony that "some of the files alleged to have been found by law enforcement in the shared space of Defendant's computer, were not found there during her analysis."[98]

In contrast, cases such as *United States v. Pirosko* have denied a motion to compel for investigative software.[99] In *Pirosko*, the court found the defendant "failed to produce any such evidence, simply alleging that he might have found such evidence had he been given access to the government's programs."[100] Subsequently, the circuit held materiality is insufficient when a request is used to determine the validity and/or reliability of the Government's forensic evidence and

[89] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[90] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012); United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).
[91] Brady v. Maryland, 373 U.S. at 87; Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213 (1942).
[92] United States v. Vue, 13 F.3d 1206, 1208 (8th Cir. 1994).
[93] United States v. Krauth, 769 F.2d 473, 476 (8th Cir. 1985).
[94] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[95] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[96] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[97] United States v. Budziak, 697 F.3d 1105 (9th Cir. 2012).
[98] United States v. Crowe, No. 11 CR 1690 MV, 2013 U.S. Dist. LEXIS 189674, 2013 WL 12335320, at *7 (D.N.M. Apr. 3, 2013).
[99] United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).
[100] United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).

to assess the information provided in the affidavit in support of the search warrant.[101]

These lines of cases have created a bi-modal test for determining the materiality of evidence for discovery purposes. Such a test inherently requires proof of a defect to investigate whether a defect exists, which is circular in nature. This test is equivalent to requiring a negative to be proved, for it to be negative. This shifting of the burden to the defense will continue to become even more challenging as technology advances.

Regardless of the Government's success in arguing materiality, an assertion of the law enforcement privilege and third-party ownership are raised. The purpose of the law enforcement privilege is to protect law enforcement techniques and procedures, to safeguard the privacy of individuals involved, and otherwise to prevent interference with an investigation.[102] A balancing test must be applied to weigh the government's interest versus those of a defendant to defend themselves.[103] Those courts that have gone beyond the issue of materiality and considered the issue of the law enforcement privilege have ruled the privilege is not applicable, i.e. *Crowe*.[104] Courts have distinguished the use of exploits in software and have consistently enforced the privilege.[105]

As for third-party ownership, an analysis must be performed to determine if the software functioning as an "instrument or agent of the Government."[106] Investigative software, such as Torrential Downpour and CPS, used in *Gonzales*, is developed for the explicit purpose of autonomously monitoring and directly downloading suspected files from a suspect's computer, circumventing traditional peer-to-peer protocols to bolster evidentiary value.[107] To prevent the undermining of future investigations, courts have successfully provided instructions on confidentiality such as, "Any proprietary information regarding the software that is disclosed to the defense expert shall not be reproduced, repeated or disseminated in any manner."[108]

As can be expected, with multiple layers of tests being applied, the outcomes of the courts across the country have been inconsistent at multiple steps of the

---

[101] United States v. Popa, No. 19-3807, 2020 U.S. App. LEXIS 17212, at *9 (6th Cir. May 29, 2020) (considered an unpublished opinion)
[102] In re Dep't of Investigation of the City of N.Y., 856 F.2d 481, 484 (2d Cir. 1988)
[103] Wells v. Connolly, No. 07 Civ. 1390 (BSJ)(DF), 2008 U.S. Dist. LEXIS 78818, 2008 WL 4443940, at *2 (S.D.N.Y. Sept. 25, 2008)
[104] United States v. Crowe, No. 11 CR 1690 MV, 2013 U.S. Dist. LEXIS 189674, 2013 WL 12335320
[105] United States v. Gaver, No. 3:16-cr-88, 2017 U.S. Dist. LEXIS 44757, at *1 (S.D. Ohio Mar. 27, 2017) (law enforcement seized the PlayPen website and deployed malware to visitors to collect information about the visitors for future prosecution)
[106] Coolidge v. New Hampshire, 403 U.S. 443 (1971)]
[107] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019)
[108] United States v. Crowe, No. 11 CR 1690 MV, 2013 U.S. Dist. LEXIS 189674, 2013 WL 12335320

analysis.[109] The tests are highly fact specific, require a strong technical understanding of the underlying facts, and require a willingness to allow discovery even when defendants are charged with the most reprehensible offenses.

With the mixed results, the Government sometimes loses and is ordered to produce the software used in investigating a suspect. When the Government is unsuccessful, the charges are often dropped or a very favorable plea deal is reached to avert production.[110] Shockingly, if the defendant's initial trial is in state court and the prosecution is required to produce the software resulting in the charges being dropped, a prosecution of the same defendant for the same offense may proceed in federal court and allows the prosecution to fully relitigate the discovery issue, assuming each have a statute prohibiting the conduct.[111] Simply put, the double jeopardy constitution protection does not apply when a state and the federal government prosecute a defendant for the same conduct.[112] While the Government is afforded multiple attempts through forum shopping, a defendant's only remedy is an appeal at the conclusion of a trial. On appeal, the appellate court considers the denial of a motion to compel production, as an evidentiary matter within the trial court's discretion, and as such applies the very high abuse of discretion standard.[113] The abuse of discretion standard has been defined as "when [the appellate court is] left with the 'definite and firm conviction that the [district] court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors' or 'where it improperly applies the law or uses an erroneous legal standard.'"[114] Not only must a defendant show the lower court abused its' power, they must also show the error was not "harmless" to receive a reversal.[115]

## Policy Analysis and Recommendation

As can be seen, the challenge imposed upon a defendant to successfully acquire information in preparation of their defense has become nearly insurmountable without some level of discovery of the investigative software. In the absence of access to forensically examine the software, a defendant realistically lacks the necessary information to: challenge probable cause of the initial search, prepare a defense, or confront and potentially impeach witnesses.

---

[109] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019); United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).
[110] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019)
[111] *See* Pro Publica, Child Porn Charges Being Dropped After Software Tools Questioned (April 3, 2019), https://patch.com/us/across-america/child-porn-charges-being-dropped-after-software-tools-questioned
[112] United States v. Lanza, 260 U.S. 377 (1922).
[113] United States v. Blood, 435 F.3d 612, 627 (6th Cir. 2006).
[114] United States v. Haywood, 280 F.3d 715, 720 (6th Cir. 2002) (quoting Huey v. Stine, 230 F.3d 226, 228 (6th Cir. 2000)).
[115] United States v. Vasilakos, 508 F.3d 401, 406 (6th Cir. 2007).

Currently, a defendant must identify the material defect of software prior to gaining access for examination.[116] Drawing such requisite information solely from computer-generated logs is nearly impossible, in the absence of blatant errors. Forensic experts, followed by courts, on a large number of instances have begun to openly recognize issue of reliability related to algorithmically created data across the spectrum of cases including driving under the influence, child pornography, and violations of copyright law.[117]

Until the issue of credibility of such software is adequately challenged and combatted, the computer-generated results will continue to serve as the sole basis for potentially erroneous searches, seizures, and arrests. The Government currently has no disincentive to ensure accuracy, even when reliance on investigative software is found to be faulty, and any evidence or contraband detected during the execution of a search warrant is legally admissible due to the good-faith exception.[118]

While existing standards and tests of law are highly favorable to the prosecution, the desires for meritorious "materiality" claims is understandable. The burden imposed upon the Government if required to allow examination by each defendant would be highly redundant and resource intensive. One of the major differences in technology crimes versus drug crimes is the inability of experts to perform testing without an identical environment. In a drug crime, a scientist is able to perform their own tests with their own equipment, and nothing about the process is proprietary or "secret". Technology crimes on the other hand, make use of complex algorithms that are device, software version, and network dependent.

The Government asserts the production of such software for examination would jeopardize future investigations if criminals learned the innerworkings of the software.[119] The Government's argument ignores that lawyers and their associated experts are officers of the court. Furthermore, this approach of preventing examination by experts is in sharp contrast to the activities these same experts perform in drug and weapon crimes. Experts should be provided with full access to investigative software for analysis to create parity with existing standards and customs used with other evidence.

The existing materiality standard could work, but only if independent examination also occurred. One method of ensuring such independence is through a reputable organization such as the Electronic Privacy & Information Center or the Electronic Frontier Foundation. By incorporating an independent certifying body, the risk of constitutional violations would substantially be reduced.

---

[116] United States v. Pirosko, 787 F.3d 358 (6th Cir. 2015).
[117] Florida v. Conley, No. 48 - 2012 -CT-000017- A / A (Orange County, FL September 22, 2014) (
[118] United States v. Katzin, 769 F.3d 163, 182 (3d Cir. 2014).
[119] United States v. Gonzales, No. CR-17-01311-001-PHX-DGC (D. Ariz. Feb. 19, 2019)

While a bit unconventional, the regular certification and testing of investigative technology is not new.[120] Across the country a system of breathalyzer certification, testing, and recertification has been implemented to ensure the investigate device are providing accurate and valid results.

Recall the scenario introduced at the beginning of the note. You had done absolutely nothing illegal were subjected to an FBI home raid and search, arrested, vilified in the press, and had your family torn apart. Without access to examine the software, the only evidence the jury will see is the incorrect computer-generated logs that claim you are guilty. Were you given a fair trial? Were you afforded due process?

Courts analyzing this split many years ago succinctly and perfectly stated, "It is quite incomprehensible that the prosecution should tender a witness to state the results of a computer's operations without having the program available for defense scrutiny and use on cross-examination if desired."[121]

[120] Fisher v. City of Eupora, 587 So.2d 878, 888 (Miss.1991) (*quoting Gibson v. Mississippi*, 458 So.2d 1046, 1047 (Miss.1984)).
[121] United States v. Liebert, 519 F.2d 542, 547-48 (3d Cir. 1975) and United States v. Di-oguardi, 428 F.2d 1033, 1038 (2d Cir. 1970).

The following writing sample is a memorandum analyzing the likelihood of client conviction based upon the Ohio criminal statute for burglary.

# Writing Sample

Jesse Hockenbury

Jesse Hockenbury

**MEMORANDUM**

*Privileged Attorney Work Product*

TO: Professor Peterson

FROM: 52152

DATE: November 30, 2018

RE: Kurt Angle: Preliminary analysis of the likelihood of conviction for burglary (File #18-1250)

---

## Issue

Under the Ohio burglary statute, is a defendant likely to be convicted when the defendant entered a school on a summer day while it was out of session, entered a room where police were awaiting, was carrying an empty duffel bag, and while being interviewed stated his intent was to cool down?

## Brief Answer

Most likely. The State must prove four elements to convict a defendant of burglary and they are the following: (1) the use of force, stealth, or deception; (2) to trespass; (3) in an occupied structure; (4) with the purpose to commit a criminal offense.

The State must prove force, stealth or deception was used to and/or during a trespass as a method for avoiding detection.

The option of force will likely be met. Mr. Angle exerted force to open a "closed" door. Even if the door had been ajar, it is foreseeable and could be inferred the door would

have been opened further to enter. Because the State can prove Angle used force this element will be successfully met.

The option of stealth will likely not be met. While Mr. Angle potentially looked both ways the circumstances of his actions do not infer the purpose of avoiding detection. Mr. Angle was looking to enter the building but was not concerned with others spotting him. Because he did not use stealth the State cannot use this option.

The option of deception is undisputed. Mr. Angle did not interact with or create any form of false impression to enter or remain within the school. The State will fail to prove deception.

The element of force, stealth or deception can successfully be met because Mr. Angle used force to enter the school.

The element of trespass is undisputed. Mr. Angle nor the school administration contend that permission was tendered. Because Mr. Angle lacked permission to enter the school the State's burden on this element has been successfully met.

To prove the school was an occupied structure the State must prove that a person was present or likely to be present in the building. On the element of a person being present, the State will succeed in showing that police officers were present in the school during the trespass, therefore satisfying the actually present element. For likely to be present, the State will fail to adequately prove there was a logical expectation that someone would be present at 6 p.m. on a day when classes were out of session and would be for the entirety of the week. The State must only prove either someone was present or likely to be present, therefore the school will be considered an occupied structure.

Finally, the State must prove the defendant trespassed with the purpose to commit a criminal offense. The purpose can be created at any point during the trespass. The State has several pieces of circumstantial evidence which point to Angle's intent being theft. The evidence includes a witness who observed Angle peering into windows and attempting entry into each door, Angle's possession of an empty duffel bag, and quick navigation to the valuables once trespassing. Because the circumstantial evidence provides a strong inference that Angle entered the school with the intent to commit criminal offense the State will successfully prove intent.

**Facts**

Kurt Angle (Mr. Angle) has been referred to our office by Professor Peterson, a friend to the Angle family, for a preliminary analysis of whether he will be convicted of burglary under Section 2911.12(A)(3) of the Ohio Revised Code.

Mr. Angle was very successful throughout his high school career both academically, achieving a 3.67 GPA, and athletically as a hockey player. His performance led to being offered acceptance to and a scholarship from Union College. Sadly, late into Mr. Angle's high school career, he began getting into trouble with law enforcement in ways incurring arrests for drug possession, petty theft, and writing bad checks. When Union College learned of his new behavior it revoked his acceptance and financial aid.

Since graduating high school, Mr. Angle has consistently been gainfully employed. At the time of the incident, Angle was employed as an Assistant Landscaper at Cutting Crew Lawn Care. The wages being earned by this position were to be garnished because

Angle was behind on child support owing a total of $9,000, and accumulating an additional $500 each month.

On Monday, June 11th Nicole Bella (Ms. Bella), a neighbor who lived across the street from the school, witnessed Mr. Angle loitering in the empty parking lot of Holy Name Middle School. Ms. Bella informed the police of the stranger's presence in the school parking lot. The presence of a stranger stood out to Bella, because the school had closed a few days prior for the summer and would not be reopened for summer school for another week. Ms. Bella continued to watch the individual as he peered in each window and tried each door until he entered a door that was possibly ajar on the far side of the building.

The police arrived and entered the front door of the school. Officers waited in a classroom with valuables for the potential trespasser. Shortly after, Mr. Angle entered the room with an empty duffel bag. Upon entering, the officers arrested Mr. Angle and transported him to headquarters.

Once at the police station, officers questioned Mr. Angle on why he had entered the building. Mr. Angle stated that he entered not for the purposes of stealing but rather to escape the heat because he had nowhere to go. After offering this defense he terminated the interview and requested counsel.

## Discussion

Ohio burglary statute requires the State to prove four elements to convict a defendant of burglary and they are the following: (1) the use of force, stealth, or deception; (2) to trespass; (3) in an occupied structure; (4) with the purpose to commit a criminal

offense. Ohio Rev. Code Ann. § 2911.12. The State's failure to meet a single element of the burglary statute would result in an unsuccessful attempt to convict.

### A. Force, Stealth, or Deception

The State must prove a defendant used force, stealth, or deception to or during trespass. Ohio Rev. Code Ann. § 2911.12. The State must only prove Mr. Angle performed one of these options to satisfy this element. Ohio Rev. Code Ann. § 2911.12.

#### i. Force

The State can use force as one way to prove the first element of the burglary statute. Ohio Rev. Code Ann. § 2911.12. Force is satisfied by any effort physically exerted during the commission of a trespass. State v. Hudson, 106 N.E.3d 205 (Ohio Ct. App. 2018).

Opening a closed door, even one that is unlocked, is sufficient to establish force. State v. Moore, 2006-Ohio-2800 (Ohio Ct. App. 2006). In *Moore*, a neighbor visited the apartment next door to have $25 returned that was borrowed. Id. The homeowner was not at the residence at the time. Id. The door to the apartment was unlocked, so the neighbor entered the residence. Id. While inside the apartment he stole a DVD player. Id.

The State will argue Angle forcefully entered the school. The door Mr. Angle entered was either closed or slightly ajar in either situation. Because the door was not open Angle would have needed to use force to enter. Like in *Moore*, the doorway was blocked by a door and therefore the act of further opening the door is force. Id. The fact the door may have been ajar does not change the outcome, force was required to open the door so Angle could enter.

In contrast, Angle will argue he did not use force to enter the school. The door was ajar meaning it was not closed and someone could enter. *Moore* only addresses a closed door, in this case the door was ajar. Id. At no point during the incident was forced used to pull a door open, break a window, or even move objects around the school. Once inside the school no force was exerted on any object within the school.

The court will likely find Mr. Angle exerted force to open a "closed" door. Even if the door had been ajar it is foreseeable and could be inferred the door would have been opened further to enter. Because the State can prove Angle used force this element will be successfully met.

**ii. Stealth**

The State can use stealth as one way to prove the first element of the burglary statute. Ohio Rev. Code Ann. § 2911.12. Stealth is defined as any secret, sly or clandestine act to avoid discovery to gain entrance into or to remain within a building or structure. State v. Dowell, 2006-Ohio-2296, 166 Ohio App. 3d 773, 853 N.E.2d 354 (2006).

Acts that can be considered stealth include ducking, peering around corners, exiting with exaggerated gentle strides, and carefully opening and closing the door to the outside. State v. Dowell, 2006-Ohio-2296, 166 Ohio App. 3d 773, 853 N.E.2d 354 (2006). In *Dowell*, the pastor of a church was preparing for a bank deposit of contributions. Id. While performing the counting, the pastor went to the restroom. Id. While in the restroom, an intruder entered the church quietly as to avoid detection. Id. The intruder progressed through the church hall by hall looking into office; prior to entering each hall

he looked both ways as not to get caught. Id. When the pastor returned to his office the money had gone missing, and the intruder had entered his office. Id.

The State will argue Mr. Angle entered the building with stealth. First, Angle entered the school when the school was out of session to aide in avoiding detection. Next, the State will point to Angle mingling in the parking lot for a period of time awaiting the perfect time to strike. When entering the door to the school, Angle looked both ways to ensure no one was watching prior to entering. The act of looking both ways to avoid detection occurred both in this case and that of *Dowell*. Id.

Conversely, Angle will argue he was not acting with stealth. His reasoning for standing in the parking lot is he had nowhere to go and found an empty parking lot to spend some time. When entering the school his only goal was to escape the heat and was unconcerned with becoming detected. Angle will also challenge the witness's account of events, and her ability to actually see what occurred. The witness was several hundreds of yards away from the doorway he entered but yet saw him look around. If Angle was attempting to avoid detection he would have seen the witness and aborted his entrance. Unlike *Dowell*, once inside the building he openly walked through the hall without concealing himself or becoming caught whereas the intruder hid around corners. Id.

The court will likely find Mr. Angle did not use stealth. While he potentially looked both ways when entering the door this alone was not enough to be stealthy. Stealth is used to prevent detection and Angle took no action to avoid detection shown by being present in the parking lot for a period of time prior to entering. The State will fail to prove stealth.

### iii. Deception

The State can use deception as one way to prove the first element of the burglary statute. Ohio Rev. Code Ann. § 2911.12. Deception is the creation of or perpetuation of an impression, or uses a false impression while withholding information from the victim. In re Meachem, 2002-Ohio-2243 (Ohio Ct. App. 2002).

Mr. Angle did not interact with anyone or create any form of false impression to enter or remain within the school, therefore the issue of deception is undisputed. The State will fail to prove deception.

## B. Trespass

The State must prove the defendant lacked authorization to be in the school and therefore trespassed. Ohio Rev. Code Ann. § 2911.12. Trespass is defined as a person's unlawful entry on another's land that is visibly enclosed. TRESPASS, Black's Law Dictionary (10th ed. 2014). Mr. Angle received neither implicit nor explicit permission to be in the school. Because he did not have permission, once Mr. Angle entered the school he became a trespasser. Mr. Angle nor the school administration contend that permission was tendered.

The element of trespass is undisputed. Because Mr. Angle lacked permission to enter the school the State's burden on this element has been successfully met.

### C. Occupied Structure

To prove occupied structure, the State must prove a person was either (1) present in the school during the trespass, or (2) likely to be present during the alleged trespass. Ohio Rev. Code Ann. § 2909.01(C)(4).

#### i. Actually Present

A structure is considered occupied if another person, aside from the trespasser and any accomplice, is present during a trespass. Ohio Rev. Code Ann. § 2909.01. Any person in an area sufficiently part of a structure will suffice as present. State v. Dowell, 166 Ohio App. 3d 773, 853 N.E.2d 354 (Ohio Ct. App. 2006). The presence of any person during a burglary, inherently creates a substantial risk of serious physical harm to that person whether it be a homeowner, investigating bystander, or emergency personnel. Ohio Rev. Code Ann. § 2909.01.

A person need not be present during the initial trespass, but rather the arrival of a person at any point qualifies as present. State v. Fairrow, 2004-Ohio-3145 (Ohio Ct. App. 2004). In *Fairrow*, a trespasser entered an empty office building on a Saturday evening outside of the business's operating hours. Id. During the commission of the trespass the office owner learned of the break in, arrived and entered the office building confronting the intruder. Id. The court held that trespassing is a continuing offense, therefore the entry of the office owner converted the breaking and entering into a burglary as he was now present. Id.

The State will assert the presence of police officers constitutes the element of a person being present. There is ambiguity in whether the police entered before or after

Mr. Angle, but as shown by *Fairrow* the police may enter at any point during the trespass and will be considered as present. Id. The primary difference in this case and *Fairrow* is the difference between an office owner and the police arriving. To draw similarities, the State will argue the presence element was intended to protect all present persons from serious physical harm, including emergency personnel. Ohio Rev. Code Ann. § 2909.01.

Conversely, Mr. Angle will argue that no one was "actually present." Moreover, the presence of the police is a defining differentiation between his case and that of *Fairrow*. Id. In *Fairrow*, the owner of the office arrived, who had a relationship with the premises, compared to the police who had no relationship with the school. Id. The intent of the presence element was to protect those with a relationship to a premise from serious risk of physical injury. Mr. Angle will also argue policy, contending that the legislature did not include the presence element intending to convert a breaking and entering to a burglary if police arrived while the crime was in progress. The extension of being present to include police would unduly punish a trespasser far beyond the purpose of the element's inclusion.

The court will likely hold the presence of police satisfies the actually present element. For case precedent the court will look to *Fairrow*, where the courts held someone was present, if another person enters the structure during the trespass. Id. The *Fairrow* case is very similar in facts except for the individual who was present being a police officer rather than an office owner. Id. Without case precedent on the presence of a police officer, the court will look to the legislature's intent of the element; to enhance the charging of breaking and entering when a person is present as they will be put at risk of serious physical harm. In considering whether police officers are at risk of the same

harm, the answer would be yes. Therefore, the court would find the statute's intent was maintained. Finally, the court will take under advisement policy decisions, while not law, are important considerations. In this case, the court will likely rule to protect the actually present over the accused.

### ii. Likely to Be Present

A building can be considered an occupied structure, even when no one is present, if evidence can show someone is likely to be present. Ohio Rev. Code Ann. § 2909.01. Likely present is defined as the "logical expectation," based upon the circumstances, that a person could be present. State v. Green, 18 Ohio App. 3d 69, 480 N.E.2d 1128 (Ohio Ct. App. 1984). If a structure is considered a dwelling, the presence of someone from time to time to maintain the property constitutes likely present. State v. Cantin, 726 N.E.2d 565, 132 Ohio App. 3d 808 (Ohio Ct. App. 1999). The school is a commercial building, not a dwelling, nor adapted for overnight accommodation. Because the school is not a dwelling, the prosecution must prove someone was likely to be present with circumstantial evidence.

When considering whether someone is likely to be present, factors such as operating hours, day of the week, time, and occupier's testimony play a role. State v. Fairrow, 2004-Ohio-3145 (Ohio Ct. App. 2004). In *Fairrow*, a trespasser entered an empty office building on a Saturday evening outside of the business's operating hours. Id.

During the trial, the office owner testified it was "highly unlikely" that he would be present on a Saturday evening, but that he did spend some Saturday mornings at the office. Id. There was also no evidence a cleaning crew or any other staff were likely be

present on this day and time. Id. The court therefore found no one was likely to be present in the office, based on the circumstantial evidence. Id.

The State will argue that teachers were likely to be present in the school throughout the week that classes were not in session, grading papers and preparing for their next courses. Further, the State will argue the presence of maintenance staff was likely, and that this factor was one primarily considered in *Fairrow*. Id. Next, the State will contrast this case from *Fairrow* by contending the crime occurred on a Monday, a common work day, versus a Saturday. Id. Finally, teachers staying past 6 p.m. was not unheard of compared to ***Fairrow*** where the victim explicitly stated he was rarely present at the time of the trespass. Id.

Angle will argue that no one was likely to be present in the school, because it was 6 p.m. on a day when classes were out of session, and would be for an entire week. Like *Fairrow*, the trespass occurred in the evening, outside of normal business hours, when it would have been rare for someone to be present. Id. In addition, the principal of the school stated to police the last day for staff had passed, inferring the building would be empty, this statement is similar to that in *Fairrow,* where the office owner admitted no one was likely to be present. Id. Because maintenance workers are considered staff and the last day for staff had passed it was unlikely anyone would be present.

The court will likely find no one was likely to be present in the school. Angle's position is strongly supported by the *Fairrow* case, which considers factors such as day, time, potential presence of a maintenance crew, and witness testimony. Id. In this case, the conduct occurred at 6 p.m. on a Monday during a planned break. During a planned summer break it was unlikely that school staff would be present, and if they were present

it would have been during normal school hours rather than in the evening. Furthermore, testimony by the principal indicated it was unlikely for someone to be present. Finally, there was no evidence a maintenance crew was likely to be present during this time.

**D. Intent**

To prove intent, the State must prove a person trespassed with the purpose to commit a criminal offense. Ohio Rev. Code Ann. § 2911.12. The purpose to commit a crime need not be developed at the beginning of a trespass, but rather can occur at any point during the trespass. State v. Moore, 2006-Ohio-2800 (Ohio Ct. App. 2006). There is a reasonable inference a person trespasses with the purpose to commit a criminal offense. State v. Kellogg, 2015-Ohio-5000 (Ohio Ct. App. 2015).

When a defendant is apprehended prior to committing a criminal offense, the inference of their intent still exists unless other circumstances can provide a different inference. State v. Kellogg, 2015-Ohio-5000 (Ohio Ct. App. 2015). While a competing inference may be proffered, the jury is not required to accept the alternative. Id. In *Kellog*, a landscaper was caught in the secured screened-in porch of a condominium by the homeowner. Id. The homeowner detected the presence of the burglar prior to a theft occurred. Id. The landscaper escaped prior to police arriving. Id. Following the intrusion, the homeowner found the screen door had been slit open next to the lock in order to open the door. Id.

At trial, the landscaper testified that he visited the house only to offer his landscaping services. Id. This alternative reasoning for his presence was offered to the jury as an alternative to a purpose of criminal intent. Id. The court held based on the

landscaper being on the back porch and the door being damaged in an area near the lock that an intent to commit a theft was present. Id. Further, the court held there is a general inference of criminal intent unless other circumstances infer otherwise. Id.

The State will argue Mr. Angle trespassed in the school to commit a theft of valuables. Prior to entering the school, Mr. Angle looked into each of the windows of the school identifying potential items that could be stolen. Upon seeing a room full of electronics, he attempted to enter each door until he found one he could enter. Further, Mr. Angle arrived at the school with an empty duffel bag which he intended to use as a tool to commit his burglary. Angle's goal to steal valuables was likely caused by a recent court decision that garnished his wages until he paid $9,000 in retroactive child support.

The State will also assert that while Mr. Angle offered an alternative reason for trespassing, the totality of the circumstances more solidly infers a criminal purpose, similar to *Kellog*. Id. Angle's peering into windows, presence and carrying of an empty duffel bag, and quickly entering the room with valuables are circumstances analogous to the location of the landscaper and damaged door in *Kellog*. Id. Because Angle identified where the valuables were, came prepared with a way to carry the stolen items, and subsequently went directly to the valuables the only reasonable inference is he entered the school with the purpose to commit a theft.

Conversely, Mr. Angle will insist his only intent was to escape the heat of summer. He was in a sad situation; his mother had kicked him out of his childhood home and onto the streets. Angle had very little, only able to take with him what he could fit in a duffel bag. He continued to carry the empty duffel bag with him both as a pillow for wherever he found to lay his head down for the night. While down on his luck, he was gainfully

employed and working to pay off his debts to the mother of his child. The school was empty and he felt it would be harmless to spend a couple hours out of the sun.

In contrast to *Kellog*, there was no circumstantial evidence that pointed to him attempting to commit a criminal offense. Id. In *Kellog*, the landscaper damaged the door near the lock to slide in the back door to avoid detection whereas Angle did not damage any doors or windows to gain entry. Id.

The court will likely find Mr. Angle entered the school with the purpose to commit a criminal offense. By default, a defendant conduct during a trespass is inferred to be for the purpose of committing a crime unless circumstances prove otherwise. Angle will provide an alternative of escaping the heat for the jury to consider. The circumstances prior to and during the trespass provide a stronger inference that his intent was to commit a theft.

## Conclusion

The State will successfully prove all four elements to convict a defendant of burglary and they are the following: (1) the use of force, stealth, or deception; (2) to trespass; (3) in an occupied structure; (4) with the purpose to commit a criminal offense.

The State must prove force, stealth or deception was used to and/or during a trespass as a method for avoiding detection.

The option of force will likely be met. Mr. Angle exerted force to open a "closed" door. Mr. Angle will content the door was ajar and could be entered without force. Even if the door had been ajar, it is foreseeable and could be inferred the door would have been

opened further to enter. Because the State can prove Angle used force this element will be successfully met

The option of stealth will likely not be met. While Mr. Angle potentially looked both ways, the circumstances of his actions do not infer the purpose of avoiding detection. Mr. Angle will argue he was looking to enter the building but was not concerned with others spotting him. In comparison, the State believes the act of looking around alone qualifies as stealth. Because he did not use stealth the State cannot use this option.

The option of deception is undisputed. Mr. Angle did not interact with or create any form of false impression to enter or remain within the school. The State will fail to prove deception.

The element of force, stealth or deception can successfully be met because Mr. Angle used force to enter the school, and the State must only prove one of the acts occurred.

The element of trespass is undisputed. Mr. Angle nor the school administration contend that permission was tendered. Because Mr. Angle lacked permission to enter the school the State's burden on this element has been successfully met.

To prove the school was an occupied structure the State must prove that a person was present or likely to be present in the building.

For a person being actually present, the State will be able to show police officers were present in the school during the trespass. The court will review the intent of the statute to determine if police qualify as a present person. Based on the intent, the court

will find police are equally protected from the risks of burglary and therefore satisfy the actually present element.

For likely to be present, the State will fail to adequately prove there was a logical expectation that someone would be present at 6 p.m. on a day when classes were out of session and would be for the entirety of the week. The school was unable to provide any evidence a person was likely to be present whether that be teachers, maintenance staff, or even custodians.

Because the State must only prove someone was present or likely to be present, the school will be considered an occupied structure.

Finally, the State must prove the defendant trespassed with the purpose to commit a criminal offense. The purpose can be created at any point during the trespass. The State has several pieces of circumstantial evidence which point to Angle's intent being theft. The evidence includes a witness who observed Angle peering into windows and attempting entry into each door, Angle's possession of an empty duffel bag, and quick navigation to the valuables once trespassing. Mr. Angle will provide an alternative reason for being present, escaping the heat, but the circumstances do not strongly support this inference. Because the circumstantial evidence a theft was Angle's purpose the State will meet its burden of proving intent.

In conclusion, the state will likely succeed in proving (1) the use of force, stealth, or deception; (2) to trespass; (3) in an occupied structure; (4) with the purpose to commit a criminal offense.

## Applicant Details

| | |
|---|---|
| First Name | **Nicholas** |
| Last Name | **Iacono** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **nicholas.iacono@georgetown.edu** |
| Address | **Address**<br>**Street**<br>**2032 N Railroad Avenue**<br>**City**<br>**Staten Island**<br>**State/Territory**<br>**New York**<br>**Zip**<br>**10306**<br>**Country**<br>**United States** |
| Contact Phone Number | **7188876522** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Georgetown University** |
| Date of BA/BS | **May 2012** |
| JD/LLB From | **Georgetown University Law Center**<br>**https://www.nalplawschools.org/employer_profile?FormID=961** |
| Date of JD/LLB | **February 1, 2022** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Georgetown Journal of Law and Public Policy** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **Yes** |

## Specialized Work Experience

## Recommenders

Shulman, Jeffrey
shulmanj@law.georgetown.edu
Laplante, Joseph
Joseph_Laplante@nhd.uscourts.gov
Barnett, Randy
rb325@law.georgetown.edu
202-662-9936

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

NICHOLAS IACONO

2032 N Railroad Avenue, Staten Island, NY 10306 • Nicholas.Iacono@georgetown.edu • (718) 887-6522

May 5, 2022

The Honorable Lewis J. Liman
United States District Court, Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Dear Judge Liman:

I am a recent graduate of Georgetown University Law Center and an incoming litigation associate at the firm of Skadden, Arps, Slate, Meagher & Flom in New York City. I am writing to apply for a clerkship in your chambers for the 2024–2025 term or later. As a fourth-generation New Yorker, I am eager to return home to the Empire State and begin my career as an attorney.

I would bring two years of clerkship and practice experience to your chambers. Beginning September 2022, I will join Skadden's Litigation and Trials practice group, representing clients in challenging, complex disputes. After a year in this role, I will clerk for Judge Thomas Hardiman on the U.S. Court of Appeals for the Third Circuit, a court that adjudicates consequential cases implicating many areas of law frequently litigated in the Southern District, including securities, antitrust, and immigration. As such, I would join your staff with a wealth of writing, researching, and analytical skills, as well as a considerable foundation of substantive legal knowledge.

Furthermore, my professional experience is not limited to the legal sphere. Before law school, I served as Director of Communications for the Archdiocese of New York's Catholic school system and as Communications Director for a Member of Congress. While in law school, I worked full-time as a development officer in Georgetown's Advancement Office, where I raised funds to support scholarships and financial aid for my fellow students. Working full-time to put myself through law school was certainly challenging, but it prepared me to balance demanding commitments and deadlines without sacrificing the quality of my work.

I also had many meaningful opportunities to develop my legal writing skills while at Georgetown. I was a senior editor on the *Georgetown Journal of Law and Public Policy* (GJLPP), and served as a Law Fellow for Professor Jeffrey Shulman, a position where I co-taught the 1L Legal Research and Writing course to first-year students. Additionally, the GJLPP selected my journal note, *Stare (In)decisis: The Elusive Role of Precedent in Originalist Theory & Practice*, for publication in its upcoming edition. The note explores the conflict between stare decisis and originalist methods of constitutional interpretation.

As the first in my family to graduate from college and the first to become an attorney, I would be honored to continue my legal training as a clerk in your chambers. My enclosed application includes my resume, unofficial law school and undergraduate transcripts, and writing sample. My writing sample is an excerpt from a memorandum written for my 1L Legal Research & Writing course. Under separate cover, Georgetown's Clerkship Office will forward letters of recommendation from Prof. Jeffrey Shulman, Prof. Randy Barnett, and Judge Joseph Laplante.

I would be happy to provide any additional information you might require. I hope to have the opportunity to speak with you further to discuss my candidacy. Thank you for your consideration.

Respectfully,

Nicholas Iacono

# NICHOLAS IACONO

**ADDRESS:** 2032 N Railroad Avenue, Staten Island, NY 10306 | **EMAIL:** Nicholas.Iacono@georgetown.edu | **PHONE:** (718) 887-6522

## EDUCATION

**GEORGETOWN UNIVERSITY LAW CENTER, Washington, DC**
*J.D., Evening Division, magna cum laude (Top 10% of graduating class), Order of the Coif, February 2022*

- **GPA:** 3.78 / 4.00
- **HONORS:** Dean's List: 1E (2018–19 Academic Year), 3E (Fall 2020 Semester)
- **AWARDS:** CALI Excellence for the Future Awards (awarded to the highest scoring student in the class):
  - Entrepreneurship: Lifecycle of Business (Fall 2020) | Corporate Law: Management Misconduct (Fall 2020)
- **LAW JOURNAL:** *The Georgetown Journal of Law and Public* Policy: Staff Editor (2019–20), Senior Editor (2021-22)
- **JOURNAL NOTE:** Nicholas Iacono, *Stare (In)decisis: The Elusive Role of Precedent in Originalist Theory & Practice*, 20 GEO. J.L. & PUB. POL'Y 389 (2022) (*forthcoming* May 2022)
- **FELLOWSHIPS:** Law Fellow, Legal Research & Writing Department (2020–21)
  Bradley Fellow, Georgetown Center for the Constitution (2019–20)
- **ACTIVITIES:** Student Bar Association: Vice President for Evening Students (2020–21), Section Representative (2018–20)
  Barristers' Council, Trial Advocacy Division: Member (2018–22)
  The Federalist Society (Georgetown Law Chapter): Vice President for Evening Students (2020–21)
  The Conservative & Libertarian Students Association (CALSA): Charter Member (2021-22)
- **SCHOLARSHIPS:** The National Italian American Foundation's (NIAF) Louis A. Caputo, Jr. Legal Scholarship (Fall 2021)

**GEORGETOWN UNIVERSITY, Washington, DC**
*B.A., magna cum laude, in Government, May 2012*

- **GPA:** 3.81 / 4.00
- **AWARDS:** The Philodemic Debate Society's *Merrick Medal for Excellence in Debate* (2012)
- **ACTIVITIES:** The Philodemic Debate Society: President (2011-12)

## BAR ADMISSIONS

**New York State**, Appellate Division, Second Department (*In Progress*)

- Passed the February 2022 Uniform Bar Examination (UBE). Application for admittance in New York is in progress.

## LEGAL EXPERIENCE

**United States Court of Appeals for the Third Circuit,** Pittsburgh, PA — *Expected* Aug. 2023 – Aug. 2024
The Hon. Thomas M. Hardiman, Circuit Judge
*Law Clerk*

- Invited to serve as a judicial law clerk in the chambers of the Hon. Thomas M. Hardiman for the 2023–24 term.

**Skadden, Arps, Slate, Meagher & Flom LLP,** New York, NY
*Associate Attorney* — *Expected* Sep. 2022

- Invited to join Skadden Arps as an associate in the firm's Complex Litigation and Trials practice group.

*Summer Associate* — May – Aug. 2021

- Drafted memos and briefs, performed legal research, and assisted attorneys with various litigation and transactional client matters.

## NON-LEGAL EXPERIENCE

**Georgetown University Law Center (GULC),** Washington, DC — Nov. 2018 – Dec. 2021, Apr. 2022 – Present
*Associate Director, Law Annual Fund*

- Engaged & solicited Georgetown alumni at law firms across the U.S. to encourage sustained philanthropic giving to the Law Center.

**National Governors Association (NGA),** Washington, DC — Sep. 2021 – Dec. 2021
*Research Assistant (Part-Time)*

- Performed research for NGA's Legal Counsel Program analyzing legal challenges to states' COVID-19 restrictions and mandates.

**The Archdiocese of New York,** New York, NY — Oct. 2016 – Aug. 2018
*Director of Communications & Public Relations, Superintendent of Schools Office*

- Served as spokesperson for the Catholic schools of the Archdiocese of NY, the second largest non-public school system in the U.S.

**New Yorkers for Independent Action PAC,** New York, NY — Apr. – Oct. 2016
*Campaign Coordinator*

- Managed an independent expenditure (IE) to support pro-school choice candidates for the New York state legislature.

**Joan Illuzzi for District Attorney Campaign,** Staten Island, NY — May – Nov. 2015
*Campaign Manager*

- Led the campaign of Manhattan prosecutor Joan Illuzzi in her run for Staten Island DA. Achieved victory in a contentious primary.

**Office of Representative Michael G. Grimm (NY-11),** Washington, DC — May 2012 – Apr. 2015
*Communications Director (2014 – 2015) | Legislative Correspondent (2013 – 2014) | Staff Assistant (2012 – 2013)*

- Managed all communications and public relations for the congressman and advised him on a broad range of legislative issues.

# LAW TRANSCRIPT

## COVER PAGE

Nicholas Iacono

---

**Law School:**

**Georgetown University Law Center**

**Note:**

The Spring 2020 semester was graded mandatory pass/fail due to the COVID-19 pandemic.

**Record of:** Nicholas Iacono
**GUID:** 838373465

**Course Level:** Juris Doctor

**Degrees Awarded:**
Juris Doctor — Feb 01, 2022
Georgetown University Law Center
Major: Law
Honors: Magna Cum Laude
Awards: Order of the Coif

Bachelor of Arts — May 19, 2012
Georgetown College
Major: Government
Honors: Magna Cum Laude

**Entering Program:**
Georgetown University Law Center
Juris Doctor
Major: Law

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2018** | | | | | | | |
| LAWJ | 001 | 97 | Civil Procedure<br>Naomi Mezey | 4.00 | A- | 14.68 | |
| LAWJ | 005 | 75 | Legal Practice: Writing and Analysis<br>Jeffrey Shulman | 2.00 | IP | 0.00 | |
| LAWJ | 008 | 97 | Torts<br>Heidi Feldman | 4.00 | B+ | 13.32 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 8.00 | 8.00 | 28.00 | 3.50 |
| Cumulative | 8.00 | 8.00 | 28.00 | 3.50 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2019** | | | | | | | |
| LAWJ | 002 | 97 | Contracts<br>Anne Fleming | 4.00 | A | 16.00 | |
| LAWJ | 004 | 97 | Con Law I: Federal System<br>Randy Barnett | 3.00 | A- | 11.01 | |
| LAWJ | 005 | 75 | Legal Practice: Writing and Analysis<br>Jeffrey Shulman | 4.00 | A- | 14.68 | |
| LAWJ | 611 | 97 | Internal Investigation Simulation: Evaluating Corporate Corruption<br>Susan McMahon | 1.00 | P | 0.00 | |

Dean's List 2018-2019

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 12.00 | 11.00 | 41.69 | 3.79 |
| Annual | 20.00 | 19.00 | 69.69 | 3.67 |
| Cumulative | 20.00 | 19.00 | 69.69 | 3.67 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Summer 2019** | | | | | | | |
| LAWJ | 003 | 06 | Criminal Justice<br>Frank Bowman | 4.00 | A- | 14.68 | |
| LAWJ | 317 | 05 | Negotiations Seminar<br>Kondi Kleinman | 3.00 | B+ | 9.99 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 7.00 | 7.00 | 24.67 | 3.52 |
| Cumulative | 27.00 | 26.00 | 94.36 | 3.63 |

----------Continued on Next Column----------

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2019** | | | | | | | |
| LAWJ | 025 | 07 | Administrative Law<br>Glen Nager | 3.00 | B+ | 9.99 | |
| LAWJ | 121 | 07 | Corporations<br>Charles Davidow | 4.00 | A- | 14.68 | |
| LAWJ | 361 | 97 | Professional Responsibility<br>Jennifer Lyman | 2.00 | A- | 7.34 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 9.00 | 9.00 | 32.01 | 3.56 |
| Cumulative | 36.00 | 35.00 | 126.37 | 3.61 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2020** | | | | | | | |
| LAWJ | 007 | 97 | Property<br>John Byrne | 4.00 | P | 0.00 | |
| LAWJ | 1145 | 08 | Mergers and Acquisitions in Practice: Advising the Board of Directors<br>Ann Stebbins | 1.00 | P | 0.00 | |
| LAWJ | 215 | 07 | Constitutional Law II: Individual Rights and Liberties<br>Jeffrey Shulman | 4.00 | P | 0.00 | |
| LAWJ | 863 | 09 | International Business Litigation and Federal Practice<br>Marlon Paz | 2.00 | P | 0.00 | |

Mandatory P/F for Spring 2020 due to COVID19

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 11.00 | 0.00 | 0.00 | 0.00 |
| Annual | 27.00 | 16.00 | 56.68 | 3.54 |
| Cumulative | 47.00 | 35.00 | 126.37 | 3.61 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Summer 2020** | | | | | | | |
| LAWJ | 1524 | 06 | Statutory Interpretation<br>Joseph Laplante | 3.00 | A+ | 12.99 | |
| LAWJ | 165 | 06 | Evidence<br>John Facciola | 3.00 | A | 12.00 | |
| LAWJ | 360 | 06 | Legal Research Skills for Practice<br>Kristina Alayan | 1.00 | A+ | 4.33 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 7.00 | 7.00 | 29.32 | 4.19 |
| Cumulative | 54.00 | 42.00 | 155.69 | 3.71 |

----------Continued on Next Page----------

**Record of:** Nicholas Iacono
**GUID:** 838373465

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2020** | | | | | | | |
| LAWJ | 1468 | 05 | Business and Financial Basics for Lawyers | 2.00 | P | 0.00 | |
| | | | Andrew Blair-Stanek | | | | |
| LAWJ | 1535 | 05 | Advanced Topics in Corporate Law: Management Misconduct | 1.00 | A | 4.00 | |
| | | | J. Travis Laster | | | | |
| LAWJ | 1617 | 08 | Entrepreneurship: The Lifecycle of a Business | 2.00 | A | 8.00 | |
| | | | David Fogel | | | | |
| LAWJ | 1722 | 05 | Lawyers as Leaders | 1.00 | P | 0.00 | |
| | | | William Treanor | | | | |
| LAWJ | 1727 | 05 | Constitutional Originalism Seminar | 3.00 | A | 12.00 | |
| | | | Keith Whittington | | | | |
| LAWJ | 536 | 27 | Legal Writing Seminar: Theory and Practice for Law Fellows | 3.00 | A | 12.00 | |
| | | | Jeffrey Shulman | | | | |
| Dean's List Fall 2020 | | | | | | | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 12.00 | 9.00 | 36.00 | 4.00 |
| Cumulative | 66.00 | 51.00 | 191.69 | 3.76 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2021** | | | | | | | |
| LAWJ | 1521 | 05 | Advanced Topics in Corporate Law: Corporate Transaction Litigation in Delaware | 1.00 | A- | 3.67 | |
| | | | Sam Glasscock | | | | |
| LAWJ | 178 | 05 | Federal Courts and the Federal System | 3.00 | P | 0.00 | |
| | | | David Vladeck | | | | |
| LAWJ | 455 | 01 | Federal White Collar Crime | 4.00 | A- | 14.68 | |
| | | | Julie O'Sullivan | | | | |
| LAWJ | 536 | 27 | Legal Writing Seminar: Theory and Practice for Law Fellows | 2.00 | A | 8.00 | |
| | | | Jeffrey Shulman | | | | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 10.00 | 7.00 | 26.35 | 3.76 |
| Annual | 29.00 | 23.00 | 91.67 | 3.99 |
| Cumulative | 76.00 | 58.00 | 218.04 | 3.76 |

----------Continued on Next Column----------

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2021** | | | | | | | |
| LAWJ | 1085 | 05 | Sentencing Law and Policy | 2.00 | P | 0.00 | |
| | | | Mark MacDougall | | | | |
| LAWJ | 1514 | 05 | Federalism in Practice: The Role of Governors and State Executives in Advancing Public Policy | | NG | | |
| | | | Jeffrey McLeod | | | | |
| LAWJ | 1514 | 81 | Federalism in Prac~~Sem | 2.00 | A | 8.00 | |
| | | | Jeffrey McLeod | | | | |
| LAWJ | 1514 | 82 | Federalism in Prac~~Field Work | 3.00 | P | 0.00 | |
| | | | Jeffrey McLeod | | | | |
| LAWJ | 1749 | 05 | Evenings with Outlaws Seminar | 3.00 | A | 12.00 | |
| | | | Jeffrey Shulman | | | | |

**Transcript Totals**

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 10.00 | 5.00 | 20.00 | 4.00 |
| Annual | 10.00 | 5.00 | 20.00 | 4.00 |
| Cumulative | 86.00 | 63.00 | 238.04 | 3.78 |

**End of Juris Doctor Record**

This is not an official transcript. Courses which are in progress may also be included on this transcript.

**Record of:** Nicholas Iacono
**ID::** 838373465

**Date of Birth:** 28-Jan

**Course Level:** Undergraduate

**High Schools Attended:**
MONSIGNOR FARRELL HIGH SCHOOL
STATEN ISLAND NY

**Degrees Awarded:**
Bachelor of Arts May 19, 2012
Georgetown College
Major: Government
Degree GPA: 3.816
Honors: Magna Cum Laude

**Transfer Credit:**
Advanced Placement
Humanities & Writing I 3.00
Intro to European History 3.00
School Total: 6.00

**Entering Program:**
Georgetown College
Bachelor of Arts
Major: Undeclared

| Subj | Crs | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|
| **Fall 2008** | | | | | | |
| FREN | 022 | Intermediate French II | 3.00 | A | 12.00 | |
| GOVT | 006 | International Relations | 3.00 | B+ | 9.99 | |
| HIST | 180 | Studies in US Hist Until 1865 | 3.00 | A- | 11.01 | |
| MATH | 007 | Intro: Math Modeling | 3.00 | A | 12.00 | |
| THEO | 001 | The Problem of God<br>Second Honors | 3.00 | A | 12.00 | |
| **Subj** | **Crs** | **Title** | **Crd** | **Grd** | **Pts** | **R** |
| **Spring 2009** | | | | | | |
| ENGL | 043 | Gateway:Intro to Crit Methods | 3.00 | B+ | 9.99 | |
| FREN | 101 | Advanced French I | 3.00 | A- | 11.01 | |
| GOVT | 008 | US Political Systems | 3.00 | A | 12.00 | |
| LING | 001 | Intro to Language | 3.00 | B | 9.00 | |
| PHIL | 010 | Intro to Ethics<br>Dean's List | 3.00 | A | 12.00 | |
| **Subj** | **Crs** | **Title** | **Crd** | **Grd** | **Pts** | **R** |
| **Fall 2009** | | | | | | |
| BIOL | 009 | Biology of Drugs & People | 3.00 | A- | 11.01 | |
| FREN | 102 | Adv Fren II:Contemp Civilizatn | 3.00 | A | 12.00 | |
| GOVT | 117 | Elements of Political Theory | 3.00 | A- | 11.01 | |
| ITAL | 011 | Intensive Basic Italian<br>Second Honors | 6.00 | A | 24.00 | |

----------Continued on Next Column----------

**Program Changed to:**
Major: Government

| Subj | Crs | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|
| **Spring 2010** | | | | | | |
| FREN | 151 | Adv French Grammar & Writing | 3.00 | A- | 11.01 | |
| GOVT | 121 | Comparative Political Systems | 3.00 | A | 12.00 | |
| ITAL | 032 | Intens Intermediate Italian | 6.00 | A | 24.00 | |
| PSYC | 001 | General Psychology | 3.00 | A- | 11.01 | |
| THEO | 100 | Intro to Christian Ethics<br>Second Honors | 3.00 | A | 12.00 | |
| **Subj** | **Crs** | **Title** | **Crd** | **Grd** | **Pts** | **R** |
| **Summer 2010** | | | | | | |
| ITAL | 111 | Intensive Advanced Italian I | 6.00 | A | 24.00 | |
| SABR | 231 | GU/Summer, L'Aquila, Italy | 0.00 | . | 0.00 | |
| **Subj** | **Crs** | **Title** | **Crd** | **Grd** | **Pts** | **R** |
| **Fall 2010** | | | | | | |
| FREN | 250 | Rdg Txts/Fr-Speak World:Cultur | 3.00 | B- | 8.01 | |
| GOVT | 445 | Foreign Policy & Military Strt | 3.00 | A | 12.00 | |
| GOVT | 463 | Dept Sem:Terrorism/ Proliferati | 3.00 | A | 12.00 | |
| HIST | 332 | Eur Global Expans in Dutch Era | 3.00 | A- | 11.01 | |
| PHIL | 192 | Causation & Causal Inference<br>Dean's List | 3.00 | A- | 11.01 | |
| **Subj** | **Crs** | **Title** | **Crd** | **Grd** | **Pts** | **R** |
| **Spring 2011** | | | | | | |
| GOVT | 396 | Tech Revolutions & Security | 3.00 | A | 12.00 | |
| GOVT | 424 | Dept Sem:Contemp.Consrv.Thgt | 3.00 | B+ | 9.99 | |
| GOVT | 569 | Multipolarity & Arms Control | 3.00 | A | 12.00 | |
| HIST | 298 | The Making of Mod Amer:1914-45<br>Second Honors | 3.00 | A | 12.00 | |
| **Subj** | **Crs** | **Title** | **Crd** | **Grd** | **Pts** | **R** |
| **Fall 2011** | | | | | | |
| COSC | 511 | Information Warfare | 3.00 | B+ | 9.99 | |
| GOVT | 231 | Constitutional Law I | 3.00 | A | 12.00 | |
| GOVT | 369 | International Security | 3.00 | A | 12.00 | |
| GOVT | 388 | Russian Foreign Policy | 3.00 | A | 12.00 | |
| GOVT | 420 | Ethical Iss Intrnl Reltns<br>Second Honors | 3.00 | A | 12.00 | |

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

**Record of:** Nicholas Iacono
**ID::** 838373465

| Subj | Crs | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|
| **Spring 2012** | | | | | | |
| GOVT | 232 | Constitutional Law II | 3.00 | A | 12.00 | |
| GOVT | 498 | Contemp Chinese Mil Thought | 3.00 | A | 12.00 | |
| ITAL | 112 | Intensive Advanced Italian II | 5.00 | A | 20.00 | |
| PHIL | 175 | Philosophy of Law First Honors | 3.00 | A | 12.00 | |

**Transcript Totals**

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 14.00 | 14.00 | 56.00 | 4.000 |
| Cumulative | 131.00 | 125.00 | 477.05 | 3.816 |

**End of Undergraduate Record**

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 05, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

It is thanks to students like Nicholas ("Nick") Iacono that teaching law has been such a privilege for me. His analytical and writing prowess, his professionalism and mature work habits, his collegiality, and, certainly not least of all, his unfailing good nature and sense of humor—these are some of the attributes that have helped Nick compile a stellar law school record. These same attributes will ensure an equally productive judicial clerkship.

Both in school—as a first-generation college and post-undergraduate student—and in his professional life, Nick has consistently set the highest goals for himself and has just as consistently me them. His resume speaks for itself, but it cannot give adequate voice to Nick's strength of character—his resilience, his determination, his sheer grit.

I have known Nick for three years; I know his work intimately. Nick was:

* a student in my first-year, year-long Legal Practice course;
* a law fellow (about which more below) for the Legal Practice course in his second year; and
* a student in my upper-level Constitutional Law II: Rights and Liberties course

At the outset of this letter, I hasten to point out that Nick is part of Georgetown Law's Evening Program. Like his Evening Program peers, he is undertaking the remarkable task of balancing a full-time job and a commitment to academic studies. Like his Evening Program peers, he starts his academic day when most of our students have already called it quits. Almost all Evening Program students work full time during the day. The lives of these students are overflowing with an all-too-bountiful harvest of responsibilities—academic, professional, and familial. Psychologically, emotionally, and, for that matter, physically, the Evening Program is a tough, tough road. And yet our Evening Program students invariably emerge as among the best and brightest we have to offer. It is borne out in grade averages, employment statistics, in the record of extracurricular successes that Evening Program students continue to compile year after year—and, yes, in clerkship offers. One pertinent example: The Evening Program recently produced two Supreme Court clerks (Tiffany Wright, clerking for Justice Sonia Sotomayor; and Betsy Henthorne, clerking for Justice Elena Kagan).

Nick is more than qualified to carry forward the Evening Program banner. He has excelled in every course he has taken with me:

1. First-Year LRW Course

Nick was a student in my year-long, first-year Legal Practice course. Over the course of the year, Nick worked to master basic research and writing skills. Nick faced some daunting Legal Practice assignments. His fall objective memo and his spring brief were models of legal writing: thoroughly researched, thoughtfully analyzed, and written in clear and compelling prose. I was enormously impressed with the conscientiousness with which he undertook each assignment; with his ability to listen to my suggestions for revision and his willingness to revise—and revise again, if need be; his grace under academic pressure; and his unfailing integrity.

2. LRW Law Fellow

On the basis of his work in Legal Practice, I chose Nick to be a Law Fellow for the Legal Practice course. Each law fellow works closely with me and collaborates with the other fellows to teach a new crop of law students basic research and writing skills. It is a tremendous opportunity for a select group of students to take, in effect, an Advanced Legal Research and Writing course. The Law Fellow position is also an ideal training ground for collaborative work habits. Frankly, there is no better opportunity for a law student to hone his lawyering skills—and Nick is currently taking full advantage of this opportunity.

3. Constitutional Law II

A word about this particular Con Law II course: In addition to taking the customary end-of-semester exam, my students are required to write a 15-page Case Comment. This assignment requires students to discuss a key case by positioning it within a line of doctrinal development, reviewing both the precedents that lead to the case as well as the case's jurisprudential legacy; students must also provide a critique of the case and the relevant doctrine. Students confer with me throughout the semester to discuss their Case Comment topic, outline, and draft(s). I take pains point this out because I have the opportunity to get to know these students—and their work—quite well. In addition, students are expected to be "on call" each night, with class participation

Jeffrey Shulman - shulmanj@law.georgetown.edu

counting for a significant portion of the final grade.

At the outset of the course, I tell my students that productive class participation is not always or only about making one's point. Nick's work in class illustrated perfectly that class participation is also about listening to one's peers, that productive participation is responsive and empathetic. This is not to say that Nick did not stand his ground when pressed. He did, and he did by relying on close readings of seminal Supreme Court opinions. In short, Nick was precisely the kind of student I am looking for—and to whom I am always grateful.

Nick also wrote an an excellent Case Comment. His piece focused on the Supreme Court case Batson v. Kentucky, 476 U.S. 79 (1986). Nick argued that while Batson's "lofty goal of ending racially-exclusionary challenges was admirable, its efficacy in doing so has been mixed at best and an abject failure at worst. . . . While the Batson Court may have intended to create a firewall against racially-motivated challenges, in many ways it created a camouflage. The decision has allowed a challenge to survive scrutiny by means of a race-neutral explanation—a requirement which has been gutted in subsequent decisions—thereby white-washing countless racially motivated challenges with an imprimatur of validity." Boldly, I thought, his comment suggested a Thirteenth Amendment challenge to racially motivated peremptory challenges.

I know Nick Iacono as well as any student it has been my privilege to teach. I know him to be a consummate professional, ready to learn and ready to go to work on day one. Nick is, in short, an ideal candidate for a judicial clerkship.

I recommend him with the greatest enthusiasm.
Thank you.

Jeffrey Shulman

Director of the Evening Program
Professor of Law, Legal Practice

Jeffrey Shulman - shulmanj@law.georgetown.edu

**UNITED STATES DISTRICT COURT**
DISTRICT OF NEW HAMPSHIRE

Chambers of
**Joseph N. Laplante**
U.S. District Judge

Warren B. Rudman
United States Courthouse
55 Pleasant Street
Concord, New Hampshire 03301
Telephone 603-225-1461

May 7, 2021

**Re: Nicholas Iacono**

Dear Judge:

This is to recommend Nicholas Iacono for a position as a law clerk.

I know Nicholas as a law student. He took my class, Statutory Interpretation, at Georgetown Law in 2020. (I teach the class as an adjunct professor at Georgetown Law, Boston College Law, University of New Hampshire Law and Suffolk University Law). Nicholas is one of hundreds of law students I have encountered over the years. He is among the very best, both in terms of written work product and class participation.

I have three benchmarks for hiring, training, and overseeing my own law clerks: (1) they must **research** with a high degree of thoroughness; (2) they must **analyze** with a high level of precision; and (3) they must **write** with a high degree of clarity.

In all candor, I am unfamiliar with Nicholas's research work. His work in my class did not involve research to any significant degree, so I cannot speak to that.

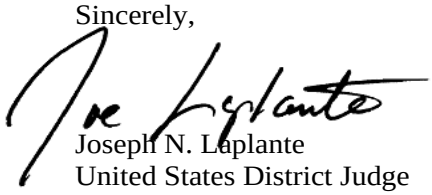
His analytical and writing skills, however, are both top level. He was always, without exception, highly prepared for class, and participated effectively in classroom discussions in a way that facilitated other students' learning. And he wrote one of the very best exams. The examination involved issue spotting, nuanced analysis with attention to detail, and writing essays under time pressure. He excelled.

He also distinguished himself during classroom discussions as a person capable of reasoning both individually and collectively, differentiating his position from the positions of others in a respectful way, and conducting himself with civility and collegiality.

I have no hesitation in recommending Nicholas for a position as a law clerk.

Consider me available to discuss Nicholas at any time should you desire to do so.

Sincerely,



Joseph N. Laplante
United States District Judge

# W R I T I N G  S A M P L E

Nicholas Iacono

---

This objective memorandum was written for Professor Jeffrey Shulman's Legal Research & Writing Seminar for Law Fellows (Fall 2020). This sample has not been edited by anyone other than me.

The question presented is whether the plaintiff's suspension by public school officials violated his First Amendment rights under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

The case involves a public high school student, A.S., who was suspended for posting an offensive "meme" to his Snapchat social media account. A.S. posted the meme on a school day while sitting aboard a bus in the school parking lot. The meme included a picture of a casket with a photo of another student, C.S., positioned to make it appear as though C.S. was lying in the casket. The background of the meme included a photo of A.S.'s high school with the American and state flags at half-mast. The meme was meant to depict a mock funeral for C.S. After C.S. complained about the meme to school officials, A.S. was suspended for violating the school's cyberbullying policy.

A.S. filed suit in the United States District Court for the Middle District of Pennsylvania, arguing that the school violated his First Amendment right to free expression under *Tinker v. Des Moines* by disciplining him for engaging in protected speech. The district court held that the school did not violate A.S.'s First Amendment rights when it suspended him. A.S. then appealed to the United States Court of Appeals for the Third Circuit.

In this sample, the Questions Presented, Statement of Facts, and Brief Answers have been omitted.

**N.B.** – The abbreviation "*R*" (e.g., "*R.1*") in this memo refers to citations to the case's hypothetical fact pattern.

Iacono Writing Sample 1 – Cover Page

## DISCUSSION

The First Amendment of the U.S. Constitution prohibits government authorities from abridging the freedom of speech. U.S. Const. amend. I. In the public school context, the Supreme Court has held that the First Amendment protects student speech, declaring that students do not "shed their constitutional right to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). However, the Court has qualified that student speech may be subject to "reasonable regulation" by school authorities "in light of the special characteristics of the school environment." *Id.* at 506. In upholding restrictions on student speech, the Court emphasizes that the constitutional rights of public school students "are not . . . coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Under *Tinker*, public school authorities may regulate and discipline student speech that (1) substantially disrupts—or is reasonably forecast to substantially disrupt—"the work and discipline of the school," 393 U.S. at 513, or (2) collides "with the rights of others to be secure and to be let alone." *Id.* at 508.

With the dawn of the internet age, ubiquitous online communication has blurred the extent of public schools' authority, under *Tinker*, to regulate speech that is created and shared off-campus via electronic media. *See generally* Jon G. Crawford, *When Student Off-Campus Cyberspeech Permeates the Schoolhouse Gate: Are There Limits to Tinker's Reach?*, 45 Urb. Law. 235, 236 (2013) (noting that the Supreme Court has not definitively clarified "the authority of school leaders to discipline students for off-campus internet speech"). The United States Court of Appeals for the Third Circuit applies *Tinker*'s substantial disruption test to evaluate the constitutionality of student speech regulations, but only where the speech is deemed "on-campus." *See B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 196 (2020) (Ambro, J., concurring) (noting that the Third

Circuit is "the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech"). The Third Circuit defines on-campus speech as that which occurs within "school-owned, -operated, or -supervised channels." *Id.* at 190.

When evaluating the constitutionality of a public school's speech restrictions, the Third Circuit will first consider, as a "threshold question," whether the "speech took place on or off" campus. *Id.* at 177. If the court concludes that the speech is on-campus, it then applies *Tinker*'s two-pronged test, examining whether (1) the speech substantially disrupted—or was reasonably forecasted to substantially disrupt—"the work and discipline of the school," 393 U.S. at 513, or (2) collided "with the rights of others to be secure and to be let alone." *Id.* at 508. However, other circuits have concluded that public schools may regulate student speech, under *Tinker*, even when it occurs off campus. *See, e.g.*, *C.R. v. Eugene Sch. Dist.*, 835 F.3d 1142 (9th Cir. 2016) (upholding the suspension of two students for teasing and sexually harassing another student on a public street); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (upholding the suspension of a student for posting offensive rap lyrics about his school to Facebook and YouTube from a home computer); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 773 (8th Cir. 2012) (upholding students' suspension for creating online blog posts containing "offensive and racist comments as well as sexually explicit and degrading comments about a particular female classmate"); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011) (upholding a student's suspension for creating a MySpace account at home on a personal computer that was dedicated to mocking a classmate); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (upholding disciplinary sanctions on a student for posting messages on a public blog from a home computer encouraging fellow students to protest a school policy); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007)

(upholding the suspension of a student for sending a threatening and violent illustration via instant message to other students using a home computer).

## I. THE COURT IS LIKELY TO FIND THAT A.S.'S SNAPCHAT IS ON-CAMPUS SPEECH BECAUSE IT WAS CREATED USING SCHOOL RESOURCES AND POSTED ON A SCHOOL DAY WHILE A.S. WAS IN THE SCHOOL PARKING LOT AND RIDING THE BUS, WHICH ARE SCHOOL-OWNED, SCHOOL-OPERATED, AND SCHOOL-SUPERVISED CHANNELS.

Where student speech takes place within "school-owned, -operated, or -supervised channels," the Third Circuit is likely to find that the speech occurred on campus. *B.L.*, 964 F.3d at 189. In *B.L.*, the Third Circuit considered whether school authorities lawfully disciplined a student for posting an inflammatory photo to her Snapchat social media account after she was cut from the school's cheerleading squad. *Id.* at 175. The photo, which was taken and posted during the weekend while B.L. was at a mall department store, showed B.L. and a friend raising middle fingers with the caption "fuck school fuck softball fuck cheer fuck everything." *Id.* After another student viewed the image and sent a screenshot to a cheerleading coach, B.L. was suspended from the team for violating the school's code of conduct. *Id.* at 175–76.

In assessing the constitutionality of B.L.'s suspension, the court observed that B.L. posted the image on a non-school day while she was away from school property, emphasizing that B.L. "created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school." *Id.* at 180. Although B.L.'s "snap mentioned the school and reached [the school's] students and officials" the court reasoned that "such few points of contact are not enough" to render B.L.'s speech on campus. *Id.* Therefore, because B.L. created and posted the Snapchat on a non-school day, without the use of school resources, while she was away from school grounds, the court determined that the post was off-

campus speech. *Id.* at 180. Thus, the court held that B.L.'s Snapchat post was protected by the First Amendment and beyond the reach of school authorities under *Tinker*. *Id.*

In the present case, the court is likely to find that A.S.'s Snapchat post was on-campus speech because (1) it was created using school resources and (2) it was posted to the internet while A.S. was on school property and sitting aboard an official school bus. *R.1.* The facts of the present case are dissimilar to the facts of *B.L.*, where the court concluded that the cheerleader's Snapchat post occurred off-campus. 964 F.3d at 180–81. In that case, B.L. took and posted the photo shared on her Snapchat account over the weekend while she was miles away from the school's campus. *Id.* at 175. Furthermore, B.L. took the photo used in her Snapchat post with her own personal smartphone camera, *id.* at 175 n.1, "without the use of school resources." *Id.* at 180. Therefore, because "B.L. created the snap away from campus, over the weekend, and without school resources," the Third Circuit concluded that her Snapchat post was off-campus speech. *Id.*

This reasoning does not apply to the present case. Unlike B.L., who created and uploaded her Snapchat post while she was away from campus at a local department store, *id.* at 175, A.S. created his Snapchat meme while "[he] was in the school parking lot," which is located on school property. *R.1.* Moreover, while B.L. created and posted her Snapchat picture when she was away from school grounds, *id.*, A.S. posted his meme while seated on an official school district bus as the vehicle "pulled out of the school parking lot." *R.1*. Furthermore, while B.L. created and posted her Snapchat content during the weekend, *B.L.*, 964 F.3d at 180, A.S. posted his meme on a school day "while waiting for the school bus." *R.1.* Lastly, unlike B.L., who captured the image featured in her Snapchat post using her personal smartphone camera, *B.L.*, 964 F.3d at 175 n.1, A.S. utilized school resources to create his meme. *R.1.* To obtain a picture of his high school to use in his meme, A.S. downloaded a digital photo of the school's facade "from the school newspaper's [online]

coverage of a school-shooting incident." *Id.* Therefore, while the court in *B.L.* emphasized that B.L.'s Snapchat content was created away from school property, on a non-school day, and without the use of school resources in concluding that the post was off-campus speech, that same reasoning does not apply to A.S.'s meme. Because A.S.'s Snapchat was (1) created using an official school photo downloaded directly from the school's website and (2) was posted on a school day while A.S. was on school property, the court is likely to conclude that the post was on-campus speech. *R.1.*

## II. THE COURT IS LIKELY TO FIND THAT A.S.'S SNAPCHAT POST WAS NOT SUBSTANTIALLY DISRUPTIVE BECAUSE IT DID NOT DISTRACT STUDENTS OR SCHOOL OFFICIALS FROM SCHOOL ACTIVITIES, NOR WAS IT ASSOCIATED WITH A PRIOR DISRUPTION AT THE SCHOOL.

The Third Circuit has held that, under *Tinker*, public schools may regulate student speech that (A) "substantially disrupt[s] the work and discipline of the school" or (B) "reasonably . . . [leads] school authorities to forecast substantial disruption of or material interference with school activities." *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002) (citing *Tinker*, 393 U.S. at 513). The Third Circuit has yet to consider a case where it has found substantial disruption resulting from student speech. *See B.L.*, 964 F.3d at 195 (Ambro, J., concurring) (noting that in cases assessing the constitutionality of student speech restrictions, the Third Circuit has invariably concluded that the disciplined speech "did not disturb the school environment"). However, in assessing whether student speech substantially disrupts the work and discipline of the school, other circuits have considered whether the speech interferes with school officials' or students' participation in classwork or school-related activities. *See, e.g.*, *Doninger v. Niehoff*, 527 F.3d 41, 50–54 (2d Cir. 2008) (finding that speech creates a substantial disruption where it causes students, teachers, or staff to "miss or be late to school-related activities" including

class, faculty training, and administrative duties). In determining whether student speech gives rise to a reasonable forecast of substantial disruption, the Third Circuit will consider whether the student speech at issue was associated with a prior disruption at the school. *See Sypniewski*, 307 F.3d at 243 (holding that a school's forecast of disruption is "well-founded' where there have been 'past incidents arising out of similar speech'") (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001)).

**A. <u>The court is likely to find that A.S.'s Snapchat meme did not substantially disrupt the work and discipline of the school because it did not interfere with school officials' or students' participation in classwork or school-related activities.</u>**

Where student speech interferes with school officials' or students' participation in classwork or school-related activities, the court is likely to find that student speech has caused a substantial disruption. In *Doninger*, the Second Circuit considered whether a student's internet blog post, which maligned school officials and spread misinformation, had caused a substantial disruption. 527 F.3d at 41, 50–54. The court noted that the post, which protested the cancellation of a popular school concert, blamed the "douchebags in the central office" for "cancell[ing] the whole [concert]" and urged students to complain to the school superintendent in order to "piss her off." *Id.* at 45.

The court highlighted that, as a direct result of the post, both the school principal and the superintendent "received a deluge of calls and emails" about the blog, causing both of them "to miss or be late to school-related activities." *Id.* at 51. The court further emphasized that "[school] administrators and teachers" were "diverted from their core educational responsibilities by the need to dissipate misguided anger [and] confusion" caused by the blog post. *Id.* at 52. The court also noted that, as a result of the post, several students were "called away either from class or other

activities . . . because of the need to manage the growing dispute." *Id.* at 51. Therefore, because the blog post distracted students and school officials from classwork and school-related activities, the Second Circuit concluded that it substantially disrupted the work and discipline of the school. *Id.* at 52; *see D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011) (finding that a student's private instant message to a classmate threatening to shoot fellow students created a substantial disruption because it caused the principal to receive numerous phone calls from concerned parents, required the reassignment of teachers to monitor entrances and public areas, and necessitated the limiting of access to the school); *Kowalski*, 652 F.3d at 574 (holding that a student's MySpace profile caused a substantial disruption because it singled out another student and "forced [that student] to miss school in order to avoid further abuse") *Wisniewski*, 494 F.3d at 36 (holding that a student's computer-generated profile picture depicting the shooting of a teacher caused a substantial disruption because it "requir[ed] special attention from school officials, replacement of the threatened teacher, and interviewing [of] pupils during class time").

However, where student speech does not interfere with students' or school officials' participation in classwork or other school-related activities, the court is likely to find that the speech is not substantially disruptive. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011). In *Blue Mountain*, the Third Circuit considered whether a student's fake MySpace profile—created to mock the school principal using sexually suggestive language—had caused a substantial disruption. *Id.* at 921. The profile, which was created on the student's home computer, claimed that the principal, Mr. McGonigle, "love[d] children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least [his] darling wife who looks like a man." *Id.* The court noted that the fake page provoked "general 'rumblings' in the school" and various instances of students "talking [about] and discussing the profile" in class. *Id*. However, the

court observed that one teacher admitted that students stopped talking about the profile "when he told them to get back to work" and that "talking in class was not a unique incident [because] he had to tell his students to stop talking about various topics about once a week." *Id.* at 923.

The court also noted that another teacher reported that the fake MySpace profile "did not disrupt her class because the [students] spoke with her during the portion of the class when students were permitted to work independently." *Id.* Although one school counselor canceled student appointments in order to sit in on meetings related to the fake profile, the court emphasized that "[t]here [was] no evidence that [the counselor] was unable to reschedule the canceled student appointments." *Id.* at 923. The court further emphasized that the "students who were to meet with [the counselor] remained in their regular classes" and thus the rescheduling did not disrupt academic instruction. *Id.*

Therefore, because J.S.'s MySpace profile did not interfere with students' or school officials' participation in classwork or other school activities, the court concluded that "J.S.'s speech did not cause a substantial disruption in the school." *Id.* at 928; *see also Tinker*, 393 U.S. at 513 (finding that students who wore black armbands to school to protest the Vietnam War had not caused a substantial disruption because they did not distract students or staff from classwork); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 321 (3d Cir. 2013) (holding that students wearing "I ♥ boobies" bracelets to school for breast cancer awareness did not cause substantial disruption because the bracelets "had been on campus for two weeks without incident" and did not lead to "any reports of disruption or student misbehavior" that would have distracted students from classwork); *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 n.9 (3d Cir. 2013) (holding that a public school student who distributed invitations to a church Christmas party before class did not create a substantial disruption because "she only sought to distribute the flyers during

*non-instructional time*") (emphasis added); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (neglecting to find substantial disruption from students who wore "SCAB" buttons to protest replacement teachers during a teacher strike because the buttons were not "inherently disruptive" to school activities).

In the present case, the court is likely to find that A.S.'s Snapchat meme did not cause a substantial disruption at Troy Donahue High School because it did not interfere with students' or school officials' participation in classwork or school activities. A.S.'s meme was tied to two incidents at the school. *See R.1.* First, the school's football captain displayed C.S.'s yearbook picture on the electronic scoreboard at the high school's homecoming game. *Id.* The yearbook photo was superimposed onto the front page of the school newspaper to create a fake obituary for C.S. *Id.* In direct reference to A.S.'s Snapchat meme, the captain asked the "students, faculty, and visitors in attendance to observe a moment of silence in remembrance of C.S." *Id.* Second, two days after the stadium incident, C.S. placed another student in a chokehold during class because the student "ha[d] been making comments saying that C.S. died." *R.1.* By contrast, *Doninger* involved a student who created a blog post encouraging fellow students to contact administrators with complaints about a canceled school concert. 527 F.3d at 51. Due to the commotion created by Doninger's blog, "administrators and teachers" had to be "diverted from their core educational responsibilities" and students were "called away either from class or other activities . . . because of the need to manage the growing dispute." *Id.* at 51–52. On those facts, the *Doninger* court concluded that the blog post created a substantial disruption at the school. *Id.* at 52.

This reasoning does not apply to the present case. Unlike the students in *Doninger*, who missed class as a result of the unrest at the school, no students at Troy Donahue High School missed class or school activities as a result of A.S.'s post. *R.1.* Although there was a brief

altercation involving C.S. and another student during one isolated class period, C.S.'s teacher reported that she "[had] things under control" and that she did not feel the need to discipline any students. *Id.* Furthermore, while A.S.'s meme was referenced at Troy Donahue's homecoming game, the event went on as planned and no students or staff had "to miss or be late to school activities" as had occurred in *Doninger*. 527 F.3d at 51. Rather, the reaction to A.S.'s meme closely resembles the reaction to J.S.'s MySpace profile in *Blue Mountain*. In *Blue Mountain*, a student created a fake MySpace profile to mock the school principal with vulgar language and sexual innuendos. 650 F.3d at 921–22. The court noted that "beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist [the principal] in dealing with the profile, no disruptions occurred." *Id.* at 929. The court reasoned that these isolated reactions did not create a substantial disruption because they "did not disrupt . . . class." *Id.* at 923. On those facts, the court concluded that J.S.'s profile did not substantially disrupt the work and discipline of the school. *Id.*

Similarly, in the present case, C.S.'s teacher reported that things were "under control," indicating that the overall reaction to A.S.'s meme did not disrupt the class or academic instruction. *R.1*. The brief altercation in C.S.'s class, the homecoming stadium incident, and the rumors claiming that C.S. had died resemble the "general rumblings" and the "few minutes of talking in class" that the court observed in *Blue Mountain*. 650 F.3d at 929. In that case, the court held that those isolated incidents and circulating rumors were insufficient to cause a substantial disruption because academic instruction was not affected. *Id.* Therefore, because A.S.'s Snapchat meme did not interfere with students' or school employees' participation in classwork or school activities, the court is likely to find that the meme did not cause a substantial disruption at the school.

**[DISCUSSION WITH RESPECT TO PARTS II.B, III, & CONCLUSION OMITTED]**

## Applicant Details

| | |
|---|---|
| First Name | **Augustus** |
| Last Name | **Ipsen** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **gusipsen@gmail.com** |
| Address | **Address**<br>**Street**<br>**628 Vanderbilt Ave, Apt 3**<br>**City**<br>**Brooklyn**<br>**State/Territory**<br>**New York**<br>**Zip**<br>**11238**<br>**Country**<br>**United States** |
| Contact Phone Number | **914-380-2121** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Lehigh University** |
| Date of BA/BS | **May 2014** |
| JD/LLB From | **Brooklyn Law School**<br>**http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23302&yr=2009** |
| Date of JD/LLB | **May 15, 2022** |
| Class Rank | **10%** |
| Law Review/ Journal | **Yes** |
| Journal(s) | **Brooklyn Law Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **Alternative Dispute Honor Society** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Edel, Martin
medel@goulstonstorrs.com
Herman, Susan
susan.herman@brooklaw.edu
718-780-7945
Hoag, Alexis
alexis.hoag@brooklaw.edu
2036454918

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Gus Ipsen
628 Vanderbilt Avenue, Apt 3
Brooklyn, NY 11238
914-380-2121
gusipsen@gmail.com

May 12, 2022

Hon. Judge Lewis J. Liman
U.S. District Court for the Southern District of New York
500 Pearl Street
New York, New York 10007

Dear Judge Liman:

I am a recent graduate of Brooklyn Law School, and I am applying for a clerkship in your chambers for the 2024-2025 term. I am in the top 7% of my class with a 3.87 GPA, I am a Notes Editor on the *Brooklyn Law Review*, and I am member of the Alternative Dispute Resolution Honor Society. After graduation, I will be working as an Associate at Schulte Roth & Zabel.

I thoroughly enjoy research and writing and grappling with far-ranging legal issues. In working for the Honorable Paul Crotty in the Southern District of New York after my 1L year, I had an opportunity to draft memos for the Judge, and to see how stimulating daily work in chambers can be. Working this semester in the pro se litigation clinic at the SDNY I have been able to engage with the litigation process from both the plaintiff and defendant side, supporting litigants in their efforts to timely and effectively communicate with the court.

Prior to law school, I worked for a New York State Assembly Member in Manhattan. There, I wrote almost daily—often for public consumption and on tight deadline—and worked as a generalist across a huge range of legislative policy matters. These early experiences allowed me to develop as a clear writer and to balance time-sensitive work, and I am excited to put this to use in chambers.

In support of my application, please find my resume, transcript, and writing sample, *New York's School Segregation Crisis: Open the Court Doors Now*, which has been selected for publication in the Spring 2022 issue of the *Brooklyn Law Review*. Professors Susan Herman, Alexis Hoag, and Martin Edel have provided letters of recommendation on my behalf.

Thank you for considering my candidacy.

Sincerely,

Gus Ipsen

# Gus Ipsen

628 Vanderbilt, Apt 3, Brooklyn, NY 11238 • 914-380-2121 • gusipsen@gmail.com

## EDUCATION

**Brooklyn Law School,** Brooklyn, NY
Candidate for Juris Doctor, May 2022
GPA: 3.87 (Top 7%)
Honors: *Brooklyn Law Review*, Notes Editor; Alternative Dispute Resolution Honor Society
Publications: Gus Ipsen, Comment, *New York's School Segregation Crisis: Open the Court Doors Now*, 87 BROOK. L. REV. (forthcoming Spring 2022).
Awards: Carswell Merit Scholarship; Dean's List; Silver Public Interest Award (500+ hours of pro bono service)
Activities: Co-chair, Brooklyn Community Bail Fund Pro Bono Project; Pandemic Employment Relief Clinic

**Lehigh University**, Bethlehem, PA
Bachelor of Arts in International Relations, Minor in Creative Writing, June 2014

## LEGAL EXPERIENCE

**New York Legal Assistance Group, SDNY Pro Se Litigation Clinic**, New York, NY
*Student Clinician* January 2022 – May 2022
Working with pro se clients on both plaintiff and defense side to provide task-based assistance, including advising on pre-filing determinations, drafting and reviewing complaints, motions, answers, discovery requests and responses.

**Schulte Roth & Zabel**, New York, NY
*Summer Associate; Incoming Associate* May 2021 – July 2021; September 2022 –
On behalf of pro bono clients, drafted section of Congressional report in support of the John Lewis Voting Rights Act. Working within the litigation department, conducted research on securities fraud sentencing, contractual enforcement matters, and data vendor diligence. On transactional side, drafted opinion letter, side letter, and other ancillary documents for investment deal.

**Disability and Civil Rights Clinic, Brooklyn Law School**, Brooklyn, NY
*Student Clinician* January 2021 – May 2021
Counseled Tennessee based client with intellectual and developmental disabilities in action brought by Department of Children's Services to terminate parental rights. Extensively researched Tennessee disability rights law, and the Americans with Disabilities Act, and drafted memos to client's full legal team ahead of court appearances.

**Professor Heidi Gilchrist, Brooklyn Law School**, Brooklyn, NY
*Research Assistant* September 2020 – October 2020
Conducted federal case law research in support of amicus brief filed by National Security Counselors and Government Accountability Project with the Supreme Court of the United States.

**Hon. Paul A. Crotty, U.S. District Court, Southern District of New York**, New York, NY
*Judicial Intern* June 2020 – August 2020
Wrote memos analyzing various class claims challenging DHS policies with respect to unaccompanied immigrant children. Wrote memo on emerging issues in the criminal context tied to COVID-19, focusing petitions for compassionate release and actions filed against federal correctional facilities alleging insufficient prison conditions and access to counsel.

## OTHER EXPERIENCE

**NYS Assemblymember Linda B. Rosenthal**, New York, NY
*Legislative Aide* August 2017 – July 2019
Worked in three-person team to manage and advance the member's 400+ pieces of legislation, helping to pass 40+ bills into law over two legislative sessions. Wrote talking points, public testimony, bill memos and letters. Coordinated media campaigns; drafted quotes, press releases and op-eds; organized press conferences and pitched press stories. Presented throughout district.

*Community Liaison* August 2015 – August 2017
Managed rotating constituent caseload of 40+ and served as liaison on district issues, serving as an advocate with government agencies, in tenant-landlord disputes, and in various other matters.

## OTHER

**Volunteer:** Urban Pathways, New York, NY, *Associate Board Member*, January 2017 – Present

Print Date: 01/17/22

Mr. Augustus I. Ipsen
628 Vanderbilt Ave., Apt. 3
Brooklyn NY 11238

Student Name: Augustus I. Ipsen
Student ID..: 0418796
Class: 3F

| | | | Courses | Cred Att | Grd | Grad Crs | GPA Calc | Faculty |
|---|---|---|---|---|---|---|---|---|
| | | | **Fall 2019** | | | | | |
| CRM | 100 | D2S | Criminal Law | 4.00 | A- | 4.00 | 14.68 | C. Godsoe |
| CPL | 102 | D3 | Civil Procedure | 4.00 | A- | 4.00 | 14.68 | C. Kim |
| TRT | 100 | D2 | Torts | 4.00 | A | 4.00 | 16.00 | A. Gold |
| LWR | 100 | D7 | Legal Research & Writing | 3.00 | A- | 3.00 | 11.01 | H. Gilchrist |
| Sem GPA | 3.758 | | Cum GPA 3.758 | 15.00 | | 15.00 | 56.37 | |
| | | | **Spring 2020** | | | | | |
| CLT | 100 | D1 | Constitutional Law | 4.00 | P | 4.00 | 0.00 | S. Herman |
| CTL | 100 | D2 | Contracts | 4.00 | P | 4.00 | 0.00 | L. Solan |
| PTE | 100 | D2 | Property | 4.00 | P | 4.00 | 0.00 | C. Beauchamp |
| LWR | 101 | D7 | Gateway: Law & Social Justice | 4.00 | P | 4.00 | 0.00 | H. Gilchrist |
| Sem GPA | 0.000 | | Cum GPA 3.758 | 16.00 | | 16.00 | 0.00 | |
| | | | **Summer 2020** | | | | | |
| CLN | 260 | E1 | Clinic - Pandem Employment Se | 1.00 | P | 1.00 | 0.00 | M. Kotkin |
| Sem GPA | 0.000 | | Cum GPA 3.758 | 1.00 | | 1.00 | 0.00 | |
| | | | **Fall 2020** | | | | | |
| CRM | 200 | E1 | Crim. Pro.: Investigations | 3.00 | A | 3.00 | 12.00 | S. Herman |
| CLT | 200 | D1 | First Amendment Law | 3.00 | A | 3.00 | 12.00 | W. Araiza |
| IPL | 216 | D1 | Introduction to IP | 3.00 | A | 3.00 | 12.00 | B. Lee |
| CPL | 210 | D1 | Alternative Dispute Resolutio | 2.00 | A | 2.00 | 8.00 | H. Anolik |
| LWR | 320 | D1 | Brooklyn Law Review | 2.00 | P # | 2.00 | 0.00 | B. Jones-Woodin |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Sem GPA 4.000 | Cum GPA 3.860 | | | | 13.00 | | 13.00 | 44.00 | |
| | Spring 2021 | | | | | | | | |
| BOL 200 | E1 | Corporations | | | 4.00 | A- | 4.00 | 14.68 | A. Gold |
| LWR 320 | D1 | Brooklyn Law Review | | | 1.00 | P | 1.00 | 0.00 | B. Jones-Woodin |
| RLP 200 | D1 | Administrative Law | | | 3.00 | A | 3.00 | 12.00 | M. Kotkin |
| LWR 415 | D1 | ADR Competitions | | | 1.00 | P | 1.00 | 0.00 | S. Caplow |
| CLN 224 | D1 | Clinic - Disabili & Civil Rgt | | | 3.00 | A- SK | 3.00 | 11.01 | P. Nair, S. Lorr |
| CLN 225 | D1 | Clinic - Dis & Civ Rgts Sem | | | 2.00 | A- | 2.00 | 7.34 | P. Nair, S. Lorr |
| Sem GPA 3.753 | Cum GPA 3.826 | | | | 14.00 | | 14.00 | 45.03 | |

Credits Attempted: 72 Credits Completed: 72 Credits toward GPA: 49 GPA Grade Points: 189.4
GPA: 3.865
Comments: # indicates successfully completed AWR. SK indicates successfully completed Skills Requirement.
Dean's List
2020 - 2021 END OF COMMENTS



Print Date: 01/17/22

Mr. Augustus I. Ipsen
628 Vanderbilt Ave., Apt. 3
Brooklyn NY 11238

Student Name: Augustus I. Ipsen
Student ID..: 0418796
Class: 3F

| | | | Courses | Cred Att | Grd | Grad Crs | GPA Calc | Faculty |
|---|---|---|---|---|---|---|---|---|
| | Fall 2021 | | | | | | | |
| LGE 120 | D1 | Professional Responsibility | | 2.00 | A | 2.00 | 8.00 | C. Carrion |
| CPL 200 | D1 | Evidence | | 4.00 | A | 4.00 | 16.00 | A. Hoag |
| CPL 311 | E1 | Comm. Mediation & Arbitration | | 2.00 | A | 2.00 | 8.00 | B. Farkas |
| RLP 210 | E1 | Antitrust Law | | 3.00 | A | 3.00 | 12.00 | M. Edel |
| LWR 320 | D1 | Brooklyn Law Review | | 1.00 | P | 1.00 | 0.00 | B. Jones-Woodin |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| LWR | 415 | D1 | ADR Competitions | 1.00 | P | 1.00 | 0.00 | S. Caplow |
| Sem GPA 4.000 | | Cum GPA 3.865 | | 13.00 | | 13.00 | 44.00 | |

END OF THIS TRANSCRIPT

Credits Attempted: 72 Credits Completed: 72 Credits toward GPA: 49 GPA Grade Points: 189.4 GPA: 3.865
Comments: # indicates successfully completed AWR. SK indicates successfully completed Skills Requirement. Dean's List
2020 - 2021 END OF COMMENTS

LEHIGH UNIVERSITY

Awarded: Bachelor of Arts 19-MAY-2014
College : Arts & Sciences
Major : International Relations



**Date Issued:** 15-JAN-2021

**Record of:** **Augustus Islington Ipsen**

**Date of Birth:** 17-APR

**Student ID:** 836729681

**Issued To:** AUGUSTUS ISLINGTON IPSEN

**Transcript Level:** Undergraduate

Course Level: Undergraduate

Program 1
Bachelor of Arts
College : Arts & Sciences
Major : International Relations

## TRANSCRIPT OF ACADEMIC RECORD

| SUBJ | NO. | COURSE TITLE | CRED | GRD | PTS | R |
|---|---|---|---|---|---|---|
| TRANSFER CREDIT ACCEPTED BY THE INSTITUTION: | | | | | | |
| Spring 2013 | | School International Training | | | | |
| GS | 391 | Directed Research | 2.00 | TR | | |
| GS | 392 | Internship In Global Studies | 4.00 | TR | | |
| IR | 118 | Issues In Ir | 4.00 | TR | | |
| IR | 119 | Issues In Intl Relations | 4.00 | TR | | |
| MLL | 097 | Language and Culture Abroad | 2.00 | TR | | |
| Ehrs: 16.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00 | | | | | | |
| INSTITUTION CREDIT: | | | | | | |
| 2010 Fall Semester | | | | | | |
| EES | 011 | ENVIRONMENTAL GEOLOGY | 3.00 | C | 6.00 | |
| EES | 022 | Exploring Earth | 1.00 | B- | 2.70 | |
| ENGL | 001 | COMPOSITION & LITERATURE | 3.00 | B | 9.00 | |
| HIST | 090 | Old Worlds/New Worlds | 4.00 | B+ | 13.20 | |
| IR | 010 | INTRO TO WORLD POLITICS | 4.00 | C- | 6.80 | |
| MUS | 061 | PHILHARMONIC ORCHESTRA | 1.00 | A | 4.00 | I |
| Ehrs: 12.00 GPA-Hrs: 12.00 QPts: 34.90 GPA: 2.90 | | | | | | |
| 2011 Spring Semester | | | | | | |
| ECO | 001 | PRIN OF ECONOMICS | 4.00 | C- | 0.00 | E |
| ENGL | 002 | COMPOSITION & LIT II | 3.00 | B+ | 9.90 | |
| GS | 001 | Intro to Global Studies | 4.00 | C | 8.00 | |
| MATH | 012 | BASIC STATISTICS | 4.00 | C+ | 9.20 | |
| MUS | 061 | PHILHARMONIC ORCHESTRA | 1.00 | A | 4.00 | I |
| Ehrs: 12.00 GPA-Hrs: 12.00 QPts: 31.10 GPA: 2.59 | | | | | | |
| 2011 Fall Semester | | | | | | |
| ENGL | 142 | Intro to Writing Poetry | 4.00 | A | 16.00 | |

********** CONTINUED ON NEXT COLUMN **********

| SUBJ | NO. | COURSE TITLE | CRED | GRD | PTS | R |
|---|---|---|---|---|---|---|
| Institution Information continued: | | | | | | |
| ENTP | 101 | Entrepreneurship | 3.00 | A | 12.00 | |
| GS | 003 | Comparative Politics | 4.00 | A | 16.00 | |
| MUS | 061 | PHILHARMONIC ORCHESTRA | 1.00 | A- | 3.70 | I |
| SPAN | 001 | ELEMENTARY SPANISH I | 4.00 | B | 12.00 | |
| Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 59.70 GPA: 3.73 | | | | | | |
| Dean's List | | | | | | |
| 2012 Spring Semester | | | | | | |
| ECO | 001 | PRIN OF ECONOMICS | 4.00 | C+ | 9.20 | I |
| ENGL | 201 | Young Adult Literature | 4.00 | B | 12.00 | I |
| IR | 074 | U.S. FOREIGN POLICY | 4.00 | D+ | 5.20 | |
| MUS | 061 | PHILHARMONIC ORCHESTRA | 1.00 | A | 4.00 | I |
| Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 37.20 GPA: 2.18 | | | | | | |
| 2012 Fall Semester | | | | | | |
| ASTR | 007 | INTRO TO ASTRONOMY | 3.00 | B | 9.00 | |
| ASTR | 008 | Intro to Astronomy Lab | 1.00 | A | 4.00 | |
| ENGL | 201 | MythTakes:Word into World | 4.00 | A | 16.00 | I |
| IR | 105 | Theories of Intl Relations | 4.00 | B | 12.00 | |
| IR | 125 | INT'L POLITICAL ECONOMY | 4.00 | B+ | 13.20 | |
| Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 54.20 GPA: 3.38 | | | | | | |
| 2013 Spring Semester | | | | | | |
| CREDIT THROUGH LEHIGH STUDY ABROAD PROGRAM | | | | | | |
| SIT Study Abroad - South Africa | | | | | | |
| 2013 Summer Session | | | | | | |
| POLS | 331 | Community Politics Internship | 4.00 | *A | 16.00 | |
| Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 16.00 GPA: 4.00 | | | | | | |
| 2013 Fall Semester | | | | | | |
| ANTH | 001 | Intro To Anthropology | 4.00 | A- | 14.80 | |
| COMM | 130 | Public Speaking | 4.00 | B | 12.00 | |
| IR | 234 | Great Power Politics | 4.00 | C+ | 9.20 | |

********** CONTINUED ON PAGE 2 **********

**A PHOTOCOPY OF THIS TRANSCRIPT IS NOT OFFICIAL**

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the express written consent of the student.

LEHIGH UNIVERSITY

Steven H. Wilson
Assistant Provost for Academic Affairs and Registrar

**TRANSCRIPT OF ACADEMIC RECORD**




**Record of:** **Augustus Islington Ipsen**

**Date Issued:** 15-JAN-2021
**Date of Birth:** 17-APR
**Student ID:** 836729681
**Transcript Level:** Undergraduate

| SUBJ | NO. | COURSE TITLE | CRED | GRD | PTS | R |
|---|---|---|---|---|---|---|
| Institution | | | | | | |
| Information continued: | | | | | | |
| IR | 345 | Democratization | 4.00 | B+ | 13.20 | |
| | | Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 49.20 GPA: 3.07 | | | | |
| 2014 Spring Semester | | | | | | |
| ANTH | 112 | Doing Archaeology | 4.00 | A | 16.00 | |
| ENGL | 388 | Independent Study | 4.00 | A | 16.00 | |

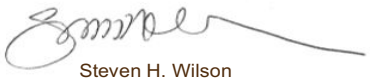
```
IR   245       International Organization      4.00 C+     9.20
IR   322       Poverty And Development         4.00 A     16.00
        Ehrs: 16.00 GPA-Hrs: 16.00  QPts:    57.20 GPA:   3.57
********************** TRANSCRIPT TOTALS ***********************
                  Earned Hrs  GPA Hrs    Points     GPA
TOTAL INSTITUTION     109.00   109.00    339.50    3.11

TOTAL TRANSFER         16.00     0.00      0.00    0.00

OVERALL               125.00   109.00    339.50    3.11
********************** END OF TRANSCRIPT ***********************
```

**A PHOTOCOPY OF THIS TRANSCRIPT IS NOT OFFICIAL**

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the express written consent of the student.



Steven H. Wilson
Assistant Provost for Academic Affairs and Registrar

May 12, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am pleased to write this recommendation is support of the candidacy of Augustus Ipsen for a clerkship with the Court.

I had the pleasure of teaching Gus this past semester in Antitrust Law. In a class of highly-motivated and well-educated students, Gus was a stand-out. He actively participated in class discussions. Gus asked great questions and, in a socratic dialog, was able to answer his own questions. Gus' questions ranged from exploring new standing doctrines (e.g., Apple v. Pepper) to new market definition doctrines, such as the two-sided market. These were among the most sophisticated and challenging doctrines. Gus' understanding of these difficult subjects, as well as the rigor of antitrust law, was reflected in his exam. Gus received one of the top two grades in my class.

In addition, Gus invariably was respectful of classmates whose knowledge and sophisticated understanding of antitrust issues did not match his own.

I have litigated for over 40 years and taught at Brooklyn Law for over 20 years. Gus would make an excellent clerk. He is smart, not afraid to speak his mind in a respectful way and writes well (at least from his exam, which was well organized and written). I wholeheartedly endorse his candidacy.

Respectfully submitted,

/Martin D. Edel/
Adjunct Professor of Law &
Director
(212) 878-5041

May 12, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing on behalf of Augustus Ipsen, who is applying for a position as your law clerk. It is my pleasure to be able to recommend him to you most enthusiastically.

I have known Mr. Ipsen as a student in two of my large classes: first-year Constitutional Law in spring semester 2020, and Criminal Procedure: Investigations in fall semester 2021. He is an A student. In Criminal Procedure, he earned one of the highest grades in the class, showing how deeply he understands and can apply highly complex law – like the many categories and exceptions of the Fourth Amendment. I was not at all surprised that he wrote such an excellent exam as throughout the semester he had demonstrated his dedication by reading carefully, participating in class, and following up with me on issues where he wanted to pin down a concept or explore additional depth.

The spring of 2020 was a unique semester, as the pandemic forced the law school to suspend in person classes in March. Because the rest of the semester, held remotely in the new world of Zoom, was so disrupted, the law school decided to suspend grades and so Mr. Ipsen's record reflects a Pass in Constitutional Law rather than the A he deserved and undoubtedly would have gotten. But throughout the disruptions, Mr. Ipsen stayed focused on his studies, not only keeping up with demanding material and ideas but regularly scheduling Zoom meetings with me to work on taking his understanding to a higher level.

Gus Ipsen is an ideal student, and I believe that the qualities he's shown during his law career would also make him an ideal law clerk. He really has it all. He is smart, analytically sophisticated, conscientious, and cares about the law. He made the most of his law school experience. In addition to earning a position at the very top of his class, he cultivated his writing abilities on the law review – both as Notes Editor and in writing an excellent note – and participated in community activities like a bail fund project. He also jumped at the chance to help people who had lost their jobs during the pandemic, participating in a newly developed Pandemic Employment Relief Clinic.

As his resume also shows, Mr. Ipsen has already accumulated a wide range of professional experience to draw on: working for a state legislator, a federal judge, a law professor, and a high-powered New York City law firm. His clinical work has given him experience with pro se litigants, administrative agencies, and clients ranging from the highly vulnerable (people with disabilities, people whose parental rights were being terminated) to sophisticated investors.

Mr. Ipsen also has personal characteristics that make him an excellent choice for the close quarters of judicial chambers. He exhibits a nice balance of humility and self-confidence, as well as considerable charm.

In short, I think Gus Ipsen is a highly desirable candidate for a law clerk position and I urge you to meet him.

If there is any additional information I can provide, please do not hesitate to let me know.

Sincerely,

Susan N. Herman
Ruth Bader Ginsburg Professor of Law

Susan Herman - susan.herman@brooklaw.edu - 718-780-7945

May 12, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

**Augustus (Gus) Ipsen**, a member of Brooklyn Law School's 2022 class, asked me to write this letter of recommendation in support of his application for a judicial clerkship. I was thrilled to accept, and I enthusiastically endorse Gus for a clerkship in your chambers. In my fourteen years of supervising young lawyers and teaching law students, Gus has one of the sharpest, most impressive legal minds I have encountered. His understanding of complex legal issues and his ability to express that understanding are striking. And most importantly, Gus is humble, inquisitive, and kind.

I first met Gus in the Fall of 2021, when he enrolled in my Evidence class. As a result of his classroom participation, scores on four quizzes, and his final examination, Gus earned an "A" in the class. Even among 100 students, Gus immediately stood out for his nuanced engagement with the materials, his ability to identify the relevant legal rules and apply the facts, and his confidence in orally defending his position. What struck me most about Gus, was his ability to succinctly verbalize his command of complicated issues and explain them in clear and approachable ways. The entire class benefited from his commentary.

Equally as important, Gus has a warm and affable disposition. We met regularly throughout the semester to discuss Evidence, navigating different professional opportunities, and Gus's experiences with experiential learning. Gus approached these conversations with thoughtful maturity. It was during these meetings that I suggested Gus explore a post-graduate judicial clerkship. As a former federal district clerk and former assistant federal public defender, I believe Gus is well-suited to navigate the demands of clerking.

Without reservation, I give **Gus Ipsen** my strongest recommendation. He is an exceptional young man whose talents should be shared and rewarded. I wholeheartedly endorse Gus's candidacy, and I am certain he will have a positive impact on chambers. Please feel free to contact me if you have any further questions, (203) 645-4918 or alexis.hoag@brooklaw.edu.

Warm regards,

*Alexis J. Hoag*

Assistant Professor of Law
Brooklyn Law School

# OPEN THE COURT DOORS NOW

## NEW YORK'S SCHOOL SEGREGATION CRISIS

### INTRODUCTION

In the eyes of some, New York State is a "progressive bastion."[1] And yet—home to 2.6 million public school students[2]—New York State has the most segregated school system of any state in the nation.[3] This problem is not abating either. Statewide, since 2010, the rate of attendance in segregated schools for Black and Latino students has increased.[4] In New York City, the country's most populous and heterogenous city,[5] half of the public schools have populations that are at least 90 percent Black and Latino.[6] This has manifested in "segregation by educational outcomes."[7]

---

[1] Vivian Wang & Jesse McKinley, *A Profound Democratic Shift in New York: 'We Seized the Moment,'* N.Y. TIMES (June 22, 2019), https://www.nytimes.com/2019/06/22/nyregion/albany-laws-ny-progressive.html [https://perma.cc/5GR5-8Z63].

[2] *New York State Education at a Glance*, N.Y.S. DEP'T OF EDUC., https://data.nysed.gov/ [https://perma.cc/PXT6-SBML].

[3] JOHN KUCSERA & GARY ORFIELD, UCLA C.R. PROJECT, NEW YORK STATE'S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE, at vi (2014) [hereinafter UCLA C.R. PROJECT 2014 REP.], https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflet-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf [https://perma.cc/74QU-ZVPS]; *see also* Nikole Hannah-Jones, *It Was Never About Busing*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/opinion/sunday/it-was-never-about-busing.html [https://perma.cc/E6UK-MLXG] (explaining that 65 percent of Black students attending public schools in New York State were attending schools with a student body that is more than 90 percent minority—the highest rate of any state in the country); Ethan Geringer-Sameth, *New York City Is Waist-Deep in a School Desegregation Conversation—How Did We Get Here?*, GOTHAM GAZETTE (Sept. 3, 2019), https://www.gothamgazette.com/city/8769-new-york-city-waist-deep-school-desegregation-conversation-how-did-we-get-here-de-blasio [https://perma.cc/8SA5-V832] (explaining that 57 percent of Latino students attended schools that were more than 90 percent minority, ranking New York State in the bottom three nationally in terms of Latino-white segregation).

[4] DANIELLE COHEN, UCLA C.R. PROJECT, NYC SCHOOL SEGREGATION REPORT CARD: STILL LAST, ACTION NEEDED NOW 10 (2021) [hereinafter UCLA C.R. PROJECT 2021 REP.] (noting also that the median Black, Latino, and American Indian student in New York State now attends schools with 78 percent low-income students, up from 68 percent in just 2010).

[5] UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 12 (noting that the student population is more than 50 percent Black and Latino and more than 12 percent Asian).

[6] Beth Fertig & Yasmeen Kahn, *School Integration 2.0: How Could New York City Do It Better?*, WNYC (June 9, 2016), https://www.wnyc.org/story/integration-20-how-could-new-york-city-do-it-better/ [https://perma.cc/F2M3-CWZ9].

[7] Gary Orfield, *Foreword* to UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 4 (noting that segregated Black and Latino schools lag dramatically behind predominantly white and Asian schools in test scores and other performance metrics).

In short, federal and state courts have failed to provide guardrails against the rampant segregation in New York's schools, instead allowing for politics, hypocrisy, bigotry, and powerful parents to shape policy for decades.[8] To finally transcend those forces, this note calls on the New York State Legislature to bring the power of New York's state courts into the decades-long fight for integration—led by students, parents, and advocates[9]—by amending the education article of the New York State Constitution.

In 1954, in *Brown v. Board of Education of Topeka*, the Supreme Court of the United States held that segregation of students in public schools "solely on the basis of race" was a violation of the Fourteenth Amendment's equal protection clause.[10] However, nearly seven decades removed from *Brown*, New York has done little beyond clearing *Brown*'s baseline mandate of not *explicitly* segregating students on the basis of race—known as *de jure* segregation.[11] In fact, since the 1960s, schools in the Northeast, which now has the most segregated schools of any region in the country, have only been growing steadily more segregated.[12]

There is no reason that New York State cannot demand more of its school districts. As other states demonstrate with their constitutional frameworks, the education article of the New York State Constitution could serve as a powerful tool to move the state well beyond *Brown* and towards educational equity and greater integration.[13] Unfortunately, as currently interpreted by New York's highest court, the education article

---

[8] *See generally* Matthew F. Delmont, WHY BUSING FAILED 23–53 (2016) (noting that *Brown* brought historic change to the United States of America, but in only barring *explicit* racial segregation in schools, where admissions are made "on the basis of race," *see Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954), the Supreme Court's ruling was not felt in the North).

[9] *See generally id.* at 23–44 (detailing the decades of local organizing and advocacy in New York pushing for greater school integration); *IntegrateNYC—Building School Integration and Education Justice*, INTEGRATENYC, https://integratenyc.org/ [https://perma.cc/5BEL-JA8C] (highlighting the work of student advocates actively fighting for greater equity and justice in New York schools).

[10] *Brown*, 347 U.S. at 493; *see also* U.S. CONST. amend. XIV, § 1.

[11] *See* Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189, 208 (1973) (applying *Brown* and explaining that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate").

[12] Hannah-Jones, *supra* note 3; Orfield, *supra* note 7, at 6 (explaining that New York City's history shows that "the default has been expanding segregation" as "[s]egregation is a self-sustaining system").

[13] *See* Jim Hilbert, *Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation*, 46 J.L. & EDUC. 1, 50 (2017) (explaining that because the US Constitution does not include an education clause, there is no supremacy over the states' ability to regulate their respective school systems under state specific education clauses).

completely fails to protect students against intense segregation, regardless of the impact on learning outcomes.[14] The relevant section of the New York State education article reads: "The legislature shall provide for the *maintenance and support* of a system of free common schools, wherein all the children of this state may be educated."[15]

Presently, to leverage this language in court, plaintiffs in New York are able to bring "adequacy suits" that allege the state has not adequately provided for the "maintenance and support" of a given school district.[16] Unfortunately, for advocates seeking greater integration, the state's highest court has set a remarkably low bar for the state to meet this burden.[17] The state meets its burden so long as students have access to minimally adequate physical facilities and classrooms, instrumentalities of learning, and reasonably up-to-date curricula.[18] As long as the state has met these minimum "input" requirements—which are largely centered on funding and physical resources—poor academic outcomes and hypersegregation[19] do not alone give plaintiffs standing.[20]

In 2003, the New York Court of Appeals in *Paynter v. State* cemented that allegations of academic failure attributable to segregation—in the absence of any claim that the state was depriving the school of adequate inputs—are simply insufficient to state a cause of action under the education article.[21] However,

---

[14] *See, e.g.*, Andrea Alajbegovic, *Still Separate, Still Unequal: Litigation as A Tool to Address New York City's Segregated Public Schools*, 22 CUNY L. REV. 304, 324 (2019) (explaining that "if the state merely provides 'adequate resources,' it 'satisfies its constitutional promise under the Education Article, even though student performance remains substandard,' segregated student body notwithstanding" (citations omitted)).

[15] N.Y. CONST. art. XI, § 1 (emphasis added).

[16] *See infra* Section III.C.

[17] *See id.*

[18] 94 N.Y. JUR. 2D *Schools, Universities, and Colleges* § 9, Westlaw (database updated Aug. 2021).

[19] This note does not hold to a rigid definition of hypersegregation but draws from various definitions in common usage. *See* ULRICH BOSER & PERPETUAL BAFFOUR, CTR. FOR AM. PROGRESS, ISOLATED AND SEGREGATED: A NEW LOOK AT THE INCOME DIVIDE IN OUR NATION'S SCHOOLING SYSTEMS 26 (2017), https://americanprogress.org/wp-content/uploads/2017/05/SESintegration-report2.pdf [https://perma.cc/RY6B-86QX] (defining hypersegregation as "[t]he proportion of schools with poverty rates that significantly vary from the district average"); *see also* UCLA C.R. PROJECT 2014 REP., *supra* note 3, at vi (defining intense segregation as schools with "less than 10% white enrollment"); PAUL L. TRACTENBERG & RYAN W. COUGHLAN, THE CTR. FOR DIVERSITY & EQUAL. IN EDUC. N.J., THE NEW PROMISE OF SCHOOL INTEGRATION AND THE OLD PROBLEM OF EXTREME SEGREGATION: AN ACTION PLAN FOR NEW JERSEY TO ADDRESS vii (2018), https://bit.ly/3reQTz5 [https://perma.cc/5M2X-5MW4] (defining intense segregation as schools with "fewer than 10% non-white students").

[20] Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 384 (2012).

[21] *Id.*

as other states demonstrate, the scope of remedial powers in state adequacy suits can be incredibly expansive.[22] Plaintiffs harmed by school segregation in New York simply need a refashioned legal predicate for tapping into the broad power of the state courts.

This note proposes a specific amendment to the education article of the New York State Constitution that aims to satisfy two objectives. First, by turning to the education article language used in both New Jersey and Minnesota, where promising claims challenging extreme segregation have survived motions to dismiss, the proposed amendment seeks to allow for a broader range of adequacy litigation—namely, litigation challenging extreme segregation in New York schools. Second, by drawing from seminal early cases in both Kentucky and Connecticut, which underscored the imperative of specificity, the proposed amendment seeks to guarantee that "reasonably integrated" schools are considered part of the New York state courts' adequacy definition. Perhaps most critically, by opening the courthouse doors to plaintiffs seeking to challenge unreasonable segregation in their school district, this proposal aims to empower all students, parents, and advocates to be the drivers of change, not merely those with political sway.

The United States is again in the midst of a national reckoning on race, but the country has been here before and failed to take decisive action.[23] New York State must now reckon with the segregation crisis that ensnares the 2.6 million public school children in its charge.[24] To make good on the decades of activism in the fight for better integrated schools, New York State must open the doors of its state courts to litigants fighting school segregation. To do this, the courts must be made to redefine a constitutionally adequate education in a manner that draws on the reams of social science research on the benefits of integrated learning environments.[25] The education article of the New York State Constitution[26]—if amended—presents a clear and powerful pathway for New York to do this.

Part I of this note reviews why the federal courts are closed off to plaintiffs working to challenge school segregation. Part II discusses why integration is worth fighting for. Part III

---

[22] Hilbert, *supra* note 13, at 50.

[23] Michael A. Fletcher, *America is Facing a Reckoning over Race, but We've Seen this Before*, UNDEFEATED (July 2, 2020), https://theundefeated.com/features/america-is-facing-a-reckoning-over-race-but-weve-seen-this-before/ [https://perma.cc/4XWH-3V2W].

[24] *New York State Education at a Glance, supra* note 2.

[25] Alajbegovic, *supra* note 14, at 324.

[26] N.Y. CONST. art. XI, § 1.

looks at the forces that have consistently enshrined segregation in New York in the absence of court intervention, the current New York State education article language, and the cases that highlight its shortcomings. Part IV assesses the education article language used in states across the nation, highlighting states where a given education article has served as a viable predicate for challenging segregation. Finally, Part V proposes a new education article for New York State that both raises the state's standard for an adequate education and serves as a predicate for seeking equitable remedies.

## I. ABSENCE OF THE FEDERAL COURTS AND NATIONAL TRENDS

The Supreme Court's ruling in *Brown v. Board of Education* is among the most celebrated opinions in American jurisprudence.[27] The Court ruled that separating children in public schools, based solely on race, is a violation of the Fourteenth Amendment's equal protection clause.[28] Yet, in New York State and much of the Northeast, segregation is not a product of admissions policies explicitly centered around race. This means that the federal courts have largely been closed off as a tool for desegregating schools in the Northeast.[29] In the words of constitutional law scholar, Erwin Chemerinsky, "[t]he promise of *Brown* of equal educational opportunity has been unfulfilled."[30]

The fateful distinction ultimately drawn by the Supreme Court in the wake of *Brown* was between *de jure* and *de facto* segregation.[31] In short, for a school district to fall within the scope of *Brown*, the public school's admission policy needs to be *explicitly* separate "on the basis" of race—known now as "*de jure*" segregation.[32] Fatefully, segregation in northern schools was,

---

[27] *See, e.g.*, Hilbert, *supra* note 13, at 44–5 (explaining that *Brown* is seen among legal practitioners and scholars as a sacred, off-limits affirmation of American values).

[28] U.S. CONST. amend. XIV, §1; Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 495 (1954) (explaining that "[s]eparate educational facilities are inherently unequal," and that "such segregation is a denial of the equal protection of the laws").

[29] Hilbert, *supra* note 13, at 13 (writing that desegregation of northern schools would become largely impossible after the Supreme Court hardened the distinction between *de jure* and *de facto* segregation); *see also* UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 4 (explaining that the South became less segregated than the North in large part because it had explicit segregation on the basis of race in public school admissions, and thus civil rights law was enforced and admissions policies reshaped).

[30] Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1*, 2014 MICH. ST. L. REV. 633, 634 (2014).

[31] Hilbert, *supra* note 13, at 12.

[32] *Id.* at 11–12; *Brown*, 347 U.S. at 493; Derrick A. Bell, Jr., *'Brown v. Board of Education' and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 527 (1980) (noting that after *Brown*, even segregation that is the "natural and foreseeable"

and remains, largely de facto segregation, as students' admissions are not explicitly based on race.[33] Instead, as an example, admissions may be based on factors such as whether a student lives within a certain geographic zone, whether a sibling attends the school, test scores, or various other non-race-based admissions screens.[34] Unchecked by the limited reach of *Brown*, the percentage of segregated schools in the Northeast has climbed steadily from 43 percent in 1968 to 51 percent in 2011.[35]

In 1973, in *Keyes v. School District No. 1, Denver, Colorado*, the Supreme Court cemented the distinction between de jure and de facto segregation. The Court stated that, "the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate."[36] In narrowing *Brown* to only cover explicit racial segregation, rather than segregation that was merely the byproduct of admissions policies not based explicitly on race, efforts to desegregate schools in the North were dealt a crippling blow.[37] Just one year later, in *Milliken v. Bradley*, the Court—for the first time—overturned a district court's desegregation decree.[38] The Court held that an integration plan attempting to combine Detroit's school zone with that of surrounding suburban districts could not stand absent a showing that the existing attendance zones had been explicitly drawn with discriminatory intent.[39] In a stinging dissent, Justice Thurgood Marshall—who had won the *Brown* case as a litigator with the NAACP—wrote that, "After 20 years of small, often difficult steps toward that great end, the Court today takes a giant step backwards."[40]

---

consequence of admissions policy may not give rise to a claim absent explicit segregation on the basis of race (quoting Columbus Bd. of Educ. v. Penick, 99 U.S. 2941, 2950 (1979))).

[33] *See* Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing A Legal Basis for Contemporary Inequality*, 47 J.L. & EDUC. 189, 192–93 & n.25 (2018) (explaining de facto segregation was often a result of school admissions techniques, such as the "neighborhood school system" or "freedom of choice"); DELMONT, *supra* note 8, at 6 (quoting James Baldwin in 1965, "De facto segregation means Negroes are segregated, but nobody did it.").

[34] *The Match: How Students Get Offers*, N.Y.C. DEP'T OF EDUC., https://www.schools.nyc.gov/enrollment/enroll-grade-by-grade/how-students-get-offers-to-doe-public-schools [https://perma.cc/U8KW-D6H9].

[35] Hannah-Jones, *supra* note 3.

[36] Keyes v. Sch. Dist. No. 1, Denver, 413 U.S. 189, 208 (1973) (emphasis omitted).

[37] Hilbert, *supra* note 13, at 12; *Keyes*, 413 U.S. at 219 (Powell, J., concurring in part and dissenting in part) ("In my view we should abandon a distinction which long since has outlived its time, and formulate constitutional principles of national rather than merely regional application.").

[38] Milliken v. Bradley, 418 U.S. 717, 753 (1974).

[39] *Id.* at 744–45, 759 (explaining that for a court-ordered desegregation decree to stand, there must be a showing of explicitly racially discriminatory "state action"); *see also* Delmont, *supra* note 8, at 17 (noting that this ruling "place[s] a nearly impossible burden of proof on those" working to desegregate, "requiring evidence of deliberate segregation").

[40] *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

In the wake of *Milliken*, legal advocates largely moved away from seeking integration through the courts, instead focusing on school funding litigation.[41] Equally significant, *Milliken* elevated the concept of local control over school admissions to something of a national norm.[42] Local control of school policies and standards—including admissions—is based on the laudable idea that community input and support for local school policies is vital to educational quality.[43] However, as Derrick Bell Jr., legal scholar and pioneer of Critical Race Theory, describes, it often results in the "maintenance of a status quo that will preserve superior educational opportunities and facilities for whites at the expense of blacks."[44] This sacrosanct conception of local control remains at the heart of New York State jurisprudence.[45]

Most recently, the US Supreme Court ruled in *Parents Involved in Community Schools v. Seattle School District No. 1* that strict scrutiny[46] is to be applied to all racial classification cases under the equal protection clause.[47] The Court held that the use of race in any desegregation plan would only be seen as a sufficiently compelling government interest if the plan was needed to remedy the effects of past, intentional, racial discrimination, or if the plan qualified as a diversity plan within higher education.[48] In short, public school admissions can only account for race for the purpose of remedying a past admissions policy that explicitly segregated students along lines of race.

---

[41] Erika K. Wilson, *Gentrification and Urban Public School Reforms: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 677, 700 (2015).

[42] Milliken, 418 U.S. at 741–42 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."); *see also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) (finding that "our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition").

[43] *Milliken*, 418 U.S. at 741–42.

[44] Bell, *supra* note 32, at 527.

[45] *See* N.Y. C.L. Union v. State, 824 N.E.2d 947, 951 (N.Y. 2005) (stating that local control is a "constitutional principle that districts make the basic decisions on funding and operating their own schools"); *see also* Paynter v. State, 797 N.E.2d 1225, 1249 (N.Y. 2003) (Smith, J., dissenting) (arguing that there is nothing inconsistent with a suit challenging segregation and the principle of local control of education, as "local control has always taken a backseat to larger state interests").

[46] Chemerinsky, *supra* note 30, at 636 (defining strict scrutiny review as the requirement that the government demonstrate its actions are "necessary to achieve a compelling purpose").

[47] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 702 (2007).

[48] *Id.* at 705 (overruling a pair of integration plans—one in Seattle and the other in Louisville—on the grounds that they were simply "racial balancing" and were not sufficiently tailored to meet either of the two aforementioned government interests); Chemerinsky, *supra* note 30, at 636.

Decades removed, *Brown* and its progeny have largely confined the reach of federal courts to explicit racial segregation.[49] As Bell asked, "How could a decision that promised so much and, by its terms, accomplished so little have gained so hallowed a place among some of the nation's better-educated and most-successful individuals?"[50] Ultimately, *Brown*'s limited scope is not wholly to blame for the fact that schools in the Northeast have only grown more segregated in recent decades. For New York State specifically, *Brown*'s shortcomings only ring as loud as they do today because of the state's repeated failure to demand more.

## II. WHY INTEGRATION IS WORTH FIGHTING FOR

Integrated classrooms are worth urgently fighting for. Integrated classrooms generate uniquely equitable and progressive outcomes, as they benefit students of all "racial and socioeconomic backgrounds."[51] Reams of national research have shown that diverse classroom settings, where students have the opportunity to learn amongst students with varying perspectives and circumstances, promote students to be more creative and motivated, while enhancing problem-solving, learning, and critical thinking skills.[52] And vitally, there is no evidence to suggest that any demographic group, across ages and subject areas, is harmed by better integrated schools.[53]

With respect to academic achievement, the research on the benefits of integration is voluminous. Across the country, racially diverse schools have been shown to bridge test score gaps between students of different racial backgrounds, and not because white students are performing worse, but because "[B]lack and/or Hispanic student achievement [has] increased."[54] Nationally, these achievement gaps were at their narrowest in the 1980s when the

---

[49] *See* Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 169 (2020) (noting, ironically, that the Fourteenth Amendment, "enacted to combat white supremacy," has been largely reshaped and repurposed to actively bar race-based considerations).

[50] Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory [https://perma.cc/357W-4RJA].

[51] Jason, *supra* note 49, at 166.

[52] AMY STUART WELLS ET AL., THE CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS 14 (Feb 2016), https://bit.ly/3O2BVWm [https://perma.cc/4HM8-484G].

[53] Roslyn Arlin Mickelson, *School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence*, RSCH. BRIEF NO. 5 (The Nat'l Coal. on Sch. Diversity, Wash. D.C.), Oct. 2016, at 2.

[54] STUART WELLS ET AL., *supra* note 52, at 12.

positive impact of integration was at its greatest.[55] Vitally, as segregation has increased in every region of the country in the decades since, these gaps in achievement have widened again.[56]

This research has been borne out in New York City, where academic achievement gaps have been shown to track closely with segregation in schools.[57] Specifically, while 91 percent of white and Asian students have tested in the top 20 percent of English language arts achievement, a majority of Black and Latino students graded in the bottom 20 percent.[58] In math, the inequities are even more stark.[59] While there are myriad factors beyond school and classroom composition that bear on academic achievement gaps, the role of segregation is undeniable.[60]

The benefits of integrated classrooms on students of all backgrounds go beyond test scores.[61] As young students gain exposure to a wider spectrum of ideas, working to reconcile new perspectives with their own preexisting understandings and beliefs, cognitive development is accelerated.[62] Further, integration has been shown to have an enormously positive impact on school climate at large.[63] There are markedly reduced levels of violence in better integrated schools, and these schools are more likely to have stable teacher staffing, which some identify as among the most important factors for academic achievement.[64]

Integrated schools are also shown to have powerfully beneficial impacts on social awareness and development.[65] Research suggests that exposure to diverse learning environments often dramatically reduces implicit bias among students, driving them to foster enhanced tolerance for varied

---

[55] George Theoharis, *'Forced Busing' Didn't Fail. Desegregation Is the Best Way to Improve Our Schools,* WASH. POST (Oct. 23, 2015), https://www.washingtonpost.com/posteverything/wp/2015/10/23/forced-busing-didnt-fail-desegregation-is-the-best-way-to-improve-our-schools/ [https://perma.cc/37YZ-8L2F].

[56] *Id.* (adding that while busing was declared a failure in the 1970s and 1980s, there were marked advancements in educational equity over that era, much of which has been eroded in subsequent decades as segregation has grown. Specifically, in the 1970s, when the National Assessment of Educational Progress began tracking the reading gap, there was an average discrepancy between white and Black seventeen-year-olds of 53 points; a gap that had narrowed to just 20 points by 1988, after a nearly two-decade commitment to integration.).

[57] UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 11.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 17 (noting that "[s]egregated schools of poverty generally have fewer resources and this leads to achievement gaps and lower lifetime opportunities and success").

[61] *See* STUART WELLS ET AL., *supra* note 52, at 6.

[62] Aprile D. Benner & Robert Crosnoe, *The Racial/Ethnic Composition of Elementary Schools and Young Children's Academic and Socioemotional Functioning*, 48 AM. EDUC. RES. J. 621, 640 (2011).

[63] STUART WELLS ET AL., *supra* note 52, at 12.

[64] *Id.*

[65] *Id.* at 9.

ways of viewing a broad spectrum of issues.[66] As the Century Foundation notes, there is an essential link between this ability to discuss various issues among people with differing viewpoints and the well-being of our democratic systems.[67]

Of particular note to policymakers and judges, research also suggests that there are various benchmarks that can ensure the benefits of integration are maximized for all students. Specifically, studies indicate that the earlier students are exposed to integrated settings the greater the benefits of integration are likely to be.[68] Further, recent research has focused on the need to achieve a "critical mass" of same-race/ethnicity classmates to help promote both the academic and socioemotional gains of integration.[69] The National Research Council indicates that meeting a threshold level of 15 percent of same-race/ethnicity peers in a classroom can help to ensure students feel comfortable in their learning environment.[70]

Finally, it must be emphatically stated that no single policy solution—better integrated schools among them—is a panacea. As Bell noted, "Diversity [alone] is not the same as redress" for underserved communities, and "[diversity] could provide the appearance of equality while leaving the underlying machinery of inequality untouched."[71] Even within integrated settings, rates of discipline are disproportionately higher among Black students, and Black students are more commonly referred to special education classes.[72] Issues of school climate, faculty-parent engagement, innovative pedagogy, and more cannot be singularly achieved by more equitable access to facilities and school resources.[73] These issues of integration and access, however, are not entirely divorced. As the UCLA Civil Rights Project notes, integration can bring with it the access to "funding, resources, and networks of opportunity" that are typically associated with students at predominantly white and Asian schools.[74]

---

[66] *Id.* at 15.
[67] *Id.* at 18.
[68] Benner & Crosnoe, *supra* note 62, at 622.
[69] *Id.* at 635.
[70] *Id.* at 631.
[71] Cobb, *supra* note 50.
[72] Vanessa Siddle Walker, *Second-Class Integration: A Historical Perspective for a Contemporary Agenda*, 79 HARV. EDUC. REV. 269, 279 (2009).
[73] *Id.*
[74] UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 17; *see also* Matt Gonzales, *Taking Up the Mantle on a Forgotten History: New York City Integration*, NYU STEINHARDT, https://steinhardt.nyu.edu/metrocenter/vue/taking-mantle-forgotten-history-new-york-city-integration [https://perma.cc/XT23-PEER] (noting that "segregationist

All told, as currently construed, the New York State education article, adopted in 1894,[75] has a narrow focus that entirely ignores decades of contemporary research.[76] Segregation in schools is objectively detrimental to learning outcomes, but for this fact to be germane in New York's courts, the education article must be amended.

## III. NEW YORK CITY AND STATE HISTORY

In the absence of both federal and state judicial intervention, the same forces of power, politics, and bigotry have dramatically shaped admissions policies in New York State for decades.[77] Nothing underscores these forces more clearly than the chilling parallels in language and approach amongst those who have fought against integration efforts in the years after *Brown* through to the present day.[78] Section III.A explores these parallels to show that little has changed, and that New York's worst-in-the-nation school segregation crisis is not likely to simply dissipate with time. Section III.B grapples with recent, more localized efforts to integrate school districts and explores their limited potential as a model on a larger scale. Finally, Section III.C explores the current language of the New York State education article and highlights the acute shortcomings with the state courts' reading of the existing language. All in all, unchecked by both state and federal courts, the same powerful constituencies continue to safeguard the segregated status quo.

### *A. Power, Politics, and Bigotry: The Controlling Forces in Lieu of Court Intervention*

In February of 1964, roughly 460,000 students—predominantly Black and Puerto Rican—held a walkout from

---

mindsets are threats to equity and have resulted in models of education premised on scarcity, hyper-competition, and opportunity hoarding").

[75] *See* Albany L. Sch. Gov't L. Ctr. & Rockefeller Inst. of Gov't, Protections in the New York State Constitution Beyond the Federal Bill of Rights 6 (Apr. 18, 2017) (unpublished manuscript) [hereinafter Protections in the New York State Constitution], https://www.nysenate.gov/sites/default/files/article/attachment/protections_in_the_new_york_state_constitution_beyond_the_federal_bill_of_rights.pdf [https://perma.cc/CTA7-P5YN].

[76] Alajbegovic, *supra* note 14, at 324.

[77] *See generally* Delmont, *supra* note 8, at 23–52 (exploring the immense political power held by small groups of largely white parents, and the intransigence of elected officials, and media, in refusing to be swayed by the activism and organizing of Black and Latino students and parents).

[78] *See* Chana Joffe-Walt, *Nice White Parents, Episode Three: 'This is Our School, How Dare You?,'* N.Y. TIMES (Aug. 6, 2020) [hereinafter *Nice White Parents, Episode Three*], https://www.nytimes.com/2020/07/23/podcasts/nice-white-parents-serial.html [https://perma.cc/2RC2-Q3AD].

their New York City schools, protesting overcrowding and segregation.[79] The February 1964 student walkout was, at the time, "the largest civil rights demonstration in the history of the United States"—even larger than the March on Washington that occurred just months prior.[80] Fatefully though, these protests did not garner support from the people and institutions with sway over local policy.[81] Echoing the calls of white parents, *The New York Times* (the *Times*) "described the [student] boycott as a 'violent, illegal approach of adult-encouraged truancy.'"[82] In an editorial, illustrating a talking point still used widely today,[83] the *Times* added, "Given the pattern of residence in New York City, the Board of Education can do just so much to lessen imbalance in the schools."[84]

A few months after the February 1964 walkout, a group of more than ten thousand white parents—organized under the name "Parents and Taxpayers"—marched from Brooklyn to City Hall in Manhattan to protest desegregation efforts and calls for expanded student busing.[85] The parents there largely adopted race-neutral language, suggesting that their children had a right to remain in their "neighborhood schools" and be kept off buses.[86] This protest underscores not just the fervor of opposition to desegregation, but the calculated manipulation of language adopted widely in the Northeast.[87]

Ten years before the "Parents and Taxpayers" march to preserve the segregated status quo, in the immediate wake of the *Brown* ruling, then New York City Schools Superintendent William Jansen claimed, "We have natural segregation here—it's accidental."[88] The superintendent went so far as to ask advocates to avoid using the word "segregation,"[89] suggesting it

---

[79] Hannah-Jones, *supra* note 3 (explaining that many of the schools across the city that Black and Puerto Rican students were zoned to were so overcrowded that students had to attend school in shifts).

[80] Delmont, *supra* note 9, at 24.

[81] *See id.* at 43.

[82] *Id.* (quoting an editorial from *The New York Times*).

[83] *See* Jason, *supra* note 49, at 187–88 (explaining then Mayor De Blasio's consistent reinforcement of the idea that people have a right to attend neighborhood schools because of the investment they make "to live in a certain area").

[84] Delmont, *supra* note 9, at 43 (quoting an editorial from *The New York Times*).

[85] *Id.* at 23.

[86] *Id.*

[87] *See id.*; *see also* Hannah-Jones, *supra* note 3 ("The term 'busing' is a race-neutral euphemism that allows people to pretend white opposition was not about integration but simply about a desire for their children to attend neighborhood schools. But the fact is that American children have ridden buses to schools since the 1920s.").

[88] Delmont, *supra* note 8, at 23, 30.

[89] *Id.* at 32 (emphasis omitted).

inferred a "deliberate act of separating."[90] Instead, the city pushed phrases like "separation" and "imbalance," which *Why Busing Failed* author, Matthew Delmont, describes as suggesting that school segregation in the North was "innocent, natural, and lawful, while perpetuating the myth that racism structured spaces and opportunities in the South but not the North."[91] By the mid-1970s, after two decades of white resistance and white flight, then New York City Schools Chancellor Irving Anker announced that integration efforts, both large and small, should end.[92]

Jumping ahead more than six decades—and still unchecked by both the federal *and* state courts—the same veiled language and political deference to those who wield it remains just as pervasive.[93] For the first five years of his mayoralty, then Mayor Bill de Blasio refused to publicly use the word "segregation" to describe New York City schools.[94] Just as Superintendent Jansen had suggested in the 1950s that integrationists just wanted to "build Rome in a Day,"[95] then Mayor de Blasio suggested that he could not simply "wipe away 400 years of American history."[96] The insinuation of Mayor de Blasio was often that segregation in schools is just a natural by-product of segregated housing patterns that existed long before his mayoralty.[97] However, there is little innocence to admissions policies creating stability for one group of families and instability for others.[98] In the nearly seven decades since *Brown*, integration efforts in New York City have largely been limited to white parents choosing or volunteering to allow Black and Latino students to attend schools with their children.[99] As Noliwe Rooks,

---

[90] *Id*.

[91] *Id*.

[92] UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 22.

[93] *See* Noliwe Rooks, *Why, 65 Years Later, School Segregation Persists: New York City Is a Perfect Case Study*, N.Y. DAILY NEWS (May 17, 2019, 6:00 AM), https://www.nydailynews.com/opinion/ny-oped-why-65-years-later-school-segregation-persists-20190517-4hh4w7shabbv5hbbnkk6zmd4hi-story.html [https://perma.cc/8G76-NX88].

[94] Eliza Shapiro, *De Blasio Acts on School Integration, but Others Lead Charge*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/2018/09/20/nyregion/de-blasio-school-integration-diversity-district-15.html [https://perma.cc/36MX-2ZG4].

[95] Delmont, *supra* note 8, at 35 (quoting George Cornell, *Tension Runs High in N.Y. Race Plan*, BIG SPRINGS DAILY HERALD (May 3, 1957)).

[96] Christina Veiga & Alex Zimmerman, *Mayor de Blasio: I Can't 'Wipe Away 400 Years of American History' in Diversifying Schools*, CHALKBEAT N.Y. (May 11, 2017, 7:13 PM), https://ny.chalkbeat.org/2017/5/11/21099812/mayor-de-blasio-i-can-t-wipe-away-400-years-of-american-history-in-diversifying-schools [https://perma.cc/LFE3-YCPT].

[97] *See id*.

[98] *See* Ujju Aggarwal & Donna Neval, *Building Justice: Segregation in NYC Schools Is No Accident*, CITY LIMITS (Oct. 24, 2016), https://citylimits.org/2016/10/24/building-justice-segregation-in-nyc-schools-is-no-accident/ [https://perma.cc/NW4L-P7SJ].

[99] Rooks, *supra* note 93.

Professor in the Africana Studies and Research Center at Cornell University writes: "Time and time again, they have refused." She also notes, "Worse still, it looks as if it may no longer be a priority to even try."[100]

With a reimagined education article, the courts could provide families and advocates a pathway for changing the status quo of segregation that is not currently available. Most critically, a path through the courts could entirely transcend the political forces that have held admissions policies in a vice grip for so long.[101]

### *B. Recent Integration Efforts in New York City*

Since the 1970s, New York City's efforts at integration have largely relied on the hope of voluntary integration.[102] Among other longer standing efforts, the city has introduced "option programs, magnet schools, [and] dual language programs."[103] Magnet schools—schools typically based around a school-wide theme, designed to attract students from a wider geographic base extending beyond usual admissions zones[104]—have struggled to gain "ideological commitment from [city] leaders" and parents.[105] Similarly, dual language programs—programs designed to teach students in both "English and their home language,"[106] and again designed to attract diverse students—often only "serv[e] . . . enclaves [of] affluent students," even within more integrated schools.[107] Voluntary integration programs shaped by local communities and officials can also succeed, but absent the

---

[100] *Id.*

[101] *See* Hilbert, *supra* note 13, at 50.

[102] UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 22.

[103] *Id.* ("[O]ption programs use student achievement levels as a way to achieve racial and economic diversity and retain white middle class families from leaving the district. The goal of these schools is to enroll a major portion of students who are reading at grade level, and then smaller but equitable portions of students who are at above and below reading grade levels.").

[104] *Id.* at v; *see also Frequently Asked Questions*, N.Y.C. MAGNET SCHS., https://www.magnetschools.nyc/faqs [https://perma.cc/P7DG-H23U].

[105] *See* UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 23–24; UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 3 (explaining that New York City has failed to commit to "building high quality magnet schools" with admissions safeguards, instead opting for free-market magnet and charter schools that have only become more segregated than "traditional public schools").

[106] *Program Options*, N.Y.C. DEP'T OF EDUC., https://www.schools.nyc.gov/learning/multilingual-learners/programs-for-english-language-learners [https://perma.cc/2J3P-VW28].

[107] UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 24; *Nice White Parents, Episode Three*, *supra* note 78 (explaining how a French Dual Language program at an increasingly integrated Brooklyn Heights elementary school was almost exclusively used by white students).

threat of judicial intervention, the aggregate impact of these efforts has been modest.[108]

In recent years, select local school districts have taken up efforts at more targeted desegregation.[109] There have been some successes, as Community Education Councils 1, 3, and 15 have created their own diversity plans, largely centered around "controlled choice."[110] However, it is often only when the highest performing schools reach a tipping point of overcrowding that these efforts at integration begin.[111] In short, conversations around integration are only being spurred by parents who have been pushed out of top performing schools. Derrick Bell generally described these types of integration efforts, often led by white parents, as "Interest Convergence."[112] He used this term to convey that Black interests in achieving a vision of racial equity were only being met when they converged with the interests of their white peers.[113]

Bell's theory of "Interest Convergence" has been used to describe recent efforts led largely by a group of white parents in Brooklyn's District 15.[114] These District 15 parents began calling

---

[108] *See* UCLA C.R. PROJECT 2014 REP., *supra* note 3, at 22 (explaining that school desegregation from the 1950s to 1980s was an important issue in New York, but most voluntary and school choice focused integration plans have been abandoned in recent decades).

[109] *Joint Hearing on School Segregation in New York City Schools Testimony Before the N.Y.C. Council Comm. on Educ. & Comm. on Civ. & Hum. Rts.*, Council Sess. 2018–2021 (2019) [hereinafter *Joint Hearing on School Segregation*] (written testimony of the New York Civil Liberties Union and the American Civil Liberties Union).

[110] *Id.*; WNYC Data News Team, *'Controlled Choice' for Integrating Schools: What It's All About*, WNYC (June 6, 2016), https://www.wnyc.org/story/controlled-choice-public-schools-explainer/ [https://perma.cc/J5E8-M7P7] (defining "controlled choice" as an admissions framework that has parents rank a subset of schools that they want their children to be enrolled in, while also allowing the city to consider and ensure that a certain percentage of students, such as those qualified for free or reduced priced lunch, are afforded admission to each school).

[111] *See* Chana Joffe-Walt, *Nice White Parents, Episode Five: 'We Know It When We See It,'* N.Y. TIMES (Aug. 20, 2020) [hereinafter *Nice White Parents, Episode Five*], https://www.nytimes.com/2020/07/23/podcasts/nice-white-parents-serial.html [https://perma.cc/K9TB-RYP7].

[112] *Id.*; David Shih, *A Theory to Better Understand Diversity, and Who Really Benefits*, NPR CODE SWITCH (Apr. 19, 2017), https://www.npr.org/sections/codeswitch/2017/04/19/523563345/a-theory-to-better-understand-diversity-and-who-really-benefits [https://perma.cc/7QTT-GKED] ("Interest convergence stipulates that black people achieve civil rights victories *only* when white and black interests converge.").

[113] Bell, *supra* note 32, at 523–24 (suggesting that even the decision in *Brown* "cannot be understood without some consideration of the decision's value to whites" and the primary value of the decision to whites was that it improved America's credibility abroad, bolstering US prestige and tethering America to its founding principle that "all men are created equal").

[114] *Nice White Parents, Episode Five*, *supra* note 111; *District 15*, INSIDESCHOOLS, https://insideschools.org/districts/15 [https://perma.cc/2RZ9-PBL6] (District 15 covers Carroll Gardens through Sunset Park, and includes parts of the Park Slope, Windsor Terrace, Boerum Hill, Fort Greene, and Red Hook neighborhoods in Brooklyn).

for a new admissions plan geared towards "integration" of local middle schools when their children were getting crowded out of the district's three highest performing middle schools—schools that minority students had largely been excluded from for decades.[115] In short, white parents began supporting changes in District 15 because "things had gotten so intense and so competitive that even the most advantaged people were losing."[116] The integration efforts in District 15 have been heralded as a positive,[117] but it is difficult to suggest that the reliance on interest convergence to catalyze such efforts presents a model for districts statewide. Of particular note, the first proposals for District 15 integration in June 2018 came some fifty-four years after Black and Puerto Rican families had demanded such a plan.[118] A predicate for court intervention can provide *all* communities the agency to seek recourse on their own terms.

Similarly, in District 3,[119] covering the Upper West Side and much of Harlem, the city began considering an elementary school rezoning only in response to overcrowding at one of the district's highest performing, predominantly white, elementary schools—Public School (P.S.) 199.[120] At the time that the city began working to address overcrowding in P.S. 199, District 3 already had schools even more segregated than its housing.[121] To address the overcrowding, the city would need to redraw zone lines and send some P.S. 199 students to the nearby P.S. 191—a predominantly Black and Latino school, with significant under-enrollment.[122] The modest plan was met with ferocious resistance. At a public meeting discussing a proposed redrawing of elementary school zone lines, one Upper West Side parent leader in 2016 claimed, "I can't be faulted for buying a home in a neighborhood where I don't want to send my child to school."[123] At a separate meeting, another parent expressed that they felt

---

[115] *Nice White Parents, Episode Five*, *supra* note 111.

[116] *Id.*

[117] UCLA C.R. PROJECT 2021 REP., *supra* note 4, at 33.

[118] *Nice White Parents, Episode Five*, *supra* note 111.

[119] *District 3*, INSIDESCHOOLS, https://insideschools.org/districts/3 [https://perma.cc/K7UR-4NM4] (District 3 covers schools from West 59th Street to West 122nd Street in Manhattan.).

[120] Patrick Wall, *The Privilege of School Choice: When Given the Chance, Will Wealthy Parents Ever Choose to Desegregate Schools?*, ATLANTIC (Apr. 25, 2017), https://www.theatlantic.com/education/archive/2017/04/the-privilege-of-school-choice/524103/ [https://perma.cc/24Y3-RPF7].

[121] Eliza Shapiro, *New Upper West Side School Integration Plans Reignite an Old Fight*, POLITICO (Oct. 25, 2016, 5:44 AM), https://www.politico.com/states/new-york/city-hall/story/2016/10/upper-west-side-school-integration-fight-goes-back-50-years-106679 [https://perma.cc/KT5R-ZSNB].

[122] *Id.*

[123] Aggarwal & Neval, *supra* note 98.

their children were being "punished" in the pursuit of diversity.[124] Some 2,600 people signed a petition demanding the city to "respect our community."[125] In District 3, as Ujju Aggarwal—a researcher and Assistant Professor at the New School for Social Research[126]—describes, "wealthy families increasingly express a belief that they have a special 'pact with the city' that ensures them access to a certain school."[127]

Ultimately, after nearly four years of heated public debate, the city approved a modest rezoning.[128] As a commentary in *The Atlantic* covering the rezoning described though, "it's hard to call this a model of integration."[129] Not only was P.S. 191 moved into a "shiny new [school] building" to attract privileged parents, but the city only first waded in to address overcrowding at one of its highest performing elementary schools.[130] While the outcome may have been positive, it is clear again that some degree of interest convergence was a catalyzing force.[131]

The lesson of District 15, District 3, and other local districts is not that bold change cannot happen absent a court order. However, amending New York State's education article can open a pathway for all New Yorkers to objectively attack segregation on its merits, on their own terms, without waiting on interest convergence to drive change.[132]

### *C. New York State: Constitutional Requirements and Notable Litigation*

This note argues that a reimagined education article of the New York State Constitution[133] can provide an incredible tool to those fighting for school integration. By contrast, the current education article language, and the state courts' interpretation of it, has effectively barred plaintiffs from challenging de facto school segregation.[134]

---

[124] Emma Whitford, *UWS Parents: We're Being 'Punished' in the Name of Diversity*, GOTHAMIST (Sept. 29, 2016, 6:38 PM) https://gothamist.com/news/uws-parents-were-being-punished-in-the-name-of-diversity [https://perma.cc/X83L-36MW].

[125] *Id.*

[126] Profile of *Ujju Aggarwal*, THE NEW SCH. FOR SOC. RSCH., https://www.newschool.edu/nssr/faculty/ujju-aggarwal/ [https://perma.cc/DV6F-255K].

[127] Aggarwal & Neval, *supra* note 98.

[128] Wall, *supra* note 120.

[129] *Id.*

[130] *Id.*

[131] *See id.* (explaining that the rezoning was initiated because of overcrowding at P.S. 199, not because of intense district-wide segregation).

[132] *See* Shapiro, *supra* note 121.

[133] N.Y. CONST. art. XI, § 1.

[134] Paynter v. State, 797 N.E.2d 1225, 1227–28 (N.Y. 2003) (holding that plaintiffs' claim challenging school segregation in Rochester, NY did not constitute a

As in other states, the education article of New York's Constitution gives rise to "adequacy claims," whereby plaintiffs allege that the state has failed to adequately meet the required standard for the state's schools.[135] In New York, the education article requires the state legislature to adequately provide for the "maintenance and support" of a system of free common schools,[136] which the New York Court of Appeals has read to require that all students be provided with a "sound basic education."[137] This "sound basic education" standard mandates the state to provide all students with the opportunity to receive an education that will allow them to "function productively as civic participants capable of voting and serving on a jury,"[138] and to "compete for jobs that enable them to support themselves."[139] To meet this burden, the Court of Appeals has established that the state is simply required to provide school districts with "minimally adequate" physical facilities, equipment, and teaching.[140] In short, if the state can demonstrate it has provided these specific threshold "inputs" to a "minimally adequate" degree,[141] it has satisfied its constitutional burden under the

claim under the education article, and was correctly dismissed by the lower court); Alajbegovic, *supra* note 14, at 324 (explaining that the state merely must provide "adequate resources" to meet its constitutional burden under the education article, even if the student body is segregated and student performance is substandard).

[135] Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2272–73 (2003) (explaining that once a court has defined adequacy, in terms of both broad goals and specific input requirements, the court's remedy is simply to "order the state to provide whatever input it found inadequate"); New York C.L. Union v. State, 824 N.E.2d 947, 949 (N.Y. 2005) (explaining that to bring an adequacy claim under the education article, a plaintiff must demonstrate two elements: (1) "the deprivation of a sound basic education"—i.e., the state has failed to adequately provide one of the established inputs to a school district—and (2) "causes attributable to the state").

[136] N.Y. CONST. art XI, § 1.

[137] Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 493 N.E.2d 359, 369 (N.Y. 1982) ("Interpreting the term education, as we do, to connote a sound basic education."); Paynter v. State, 797 N.E.2d 1225, 1228 (N.Y. 2003) (noting that in *Levittown* the court established that "students have a constitutional right to a 'sound basic education' and could prove a violation of this right by demonstrating 'gross and glaring inadequacy' in their schools").

[138] Maisto v. State, 64 N.Y.S.3d 139, 143 (2017) (quoting Aristy-Farer v. State, 81 N.E.3d 360, 363 (N.Y. 2017)).

[139] *Id.* (quoting Aristy-Farer v. State, 81 N.E.3d 360, 363 (N.Y. 2017)).

[140] *Paynter*, 797 N.E.2d at 1228 (quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 661 (N.Y. 1995)); *see* Alajbegovic, *supra* note 14, at 324 (writing that the constitutional promise of the education clause is satisfied so long as a given district has minimally adequate resources, without any regard to the segregation of the student body).

[141] *Paynter*, 797 N.E.2d at 1228 ("[M]inimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn[;] . . . access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks[;] . . . [and] minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas." (quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 661 (N.Y. 1995))).

education article.[142] In turn, if a school district is plagued by hypersegregation, but the state has provided it with minimally adequate inputs—facilities, equipment, teaching, etc.—the education article does not provide a cause of action.[143]

In the context of suits challenging de facto segregation, the painful limitations of the "sound basic education" standard are illustrated in both the 2003 decision in *Paynter v. State* and the 2005 decision in *New York Civil Liberties Union v. State* (*NYCLU*). In *Paynter*, a class of fifteen Black students in Rochester, New York brought an education article action alleging that racial and socioeconomic segregation had prevented them from receiving a sound basic education.[144] The New York Court of Appeals upheld this dismissal of plaintiffs' claim without ever even considering the merits of the allegation.[145] The court held that racial integration of schools had no bearing on the inputs it considers in determining whether a school district is meeting the requirements of "adequacy."[146] The court wrote that the plaintiffs' "novel theory" around the "composition of the student bod[y]" did not allege an inadequacy of teaching, facilities, or instrumentalities of learning.[147] Perhaps most striking in the court's analysis in *Paynter* is the open acknowledgement that school segregation may well lead to "terrible educational results."[148]

Just two years later, in *NYCLU*, the New York Civil Liberties Union and other interested parties brought an education article claim alleging the state had failed to provide students from twenty-seven different schools across New York State with "a sound basic education."[149] Rather than allege a deficiency attributable to the state though, plaintiffs asked "the [s]tate [to] determine the causes of [academic] failure."[150] Again, the court found that an allegation of "academic failure"—an output—without a specific

---

[142] Alajbegovic, *supra* note 14, at 323.

[143] *See Paynter*, 797 N.E.2d at 1226–27.

[144] *Id.* at 1227 (Plaintiff's allegation was that schools in Rochester have high levels of both "poverty concentration and racial isolation" which correlates directly with substandard academic performance, thereby preventing this class of students from receiving a sound basic education.).

[145] *Id.*

[146] *Id.* at 1229; Black, *supra* note 20, at 384 (explaining that "[e]ven if the plaintiffs established inadequate education in Rochester, they did not connect the inadequacy to a resource deprivation attributable to the state").

[147] *Paynter*, 797 N.E.2d at 1225, 1226–27.

[148] *Id.* at 1228–29 (acknowledging the strong research correlating concentrated poverty and racial isolation in schools with "poor educational performance").

[149] N.Y. C.L. Union v. State, 824 N.E.2d 947, 949 (N.Y. 2005) (Plaintiffs contended they, along with the schools cited in their case, were representative of a class of approximately 75,000 students across roughly 150 schools statewide.).

[150] *Id.*

allegation that the state has failed to adequately provide a certain required input, is insufficient to state a cause of action.[151]

The best known and perhaps most successful case invoking New York's education article is *Campaign for Fiscal Equity, Inc. v. State* (*CFE*), which attacked the "adequacy" of the state's education financing system for New York City's public schools.[152] As a result of the suit, the court ordered the state legislature to provide a framework for ensuring New York City schools were adequately funded.[153] The ruling led the state legislature to pass the New York State Education Budget and Reform Act of 2007, which, drawing on the funding inadequacies highlighted in *CFE*, called for $5.5 billion to be paid to schools statewide over a four-year period.[154] However, most vital for present purposes is what *CFE* underscores: the court conceptualizes "inputs" needed to provide a constitutionally adequate education as "tangible resources such as buildings, books, teachers, and services."[155] While school funding fits squarely within this conception of resources, school demographics and inequitable admissions policies do not.[156]

---

[151] *Id.* at 951–52 (underscoring that an action under the education article must allege that the state has failed in its obligation to provide adequate support to a school *district,* not an individual school, and that the state's responsibility is to provide minimally adequate support to school districts, who then—in keeping with local control—have discretion to make local decisions about school operation, rather than specific schools.).

[152] Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 347 (N.Y. 2003).

[153] *Id.* at 348 (holding that "[t]he State need only ascertain the actual cost of providing a sound basic education in New York City. Reforms to the current system of financing school funding and managing schools should address the shortcomings of the current system by ensuring, as a part of that process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education.").

[154] *Equity*, ALL. FOR QUALITY EDUC., https://www.aqeny.org/equity/ [https://perma.cc/5HQF-KLB9] (explaining that in 2007 Governor Spitzer signed the Foundation Aid formula into law and proclaim it was designed "to provide a statewide solution to the school-funding needs highlighted by the Campaign for Fiscal Equity lawsuit"); *see also* Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1897–98 (2012) (noting that in the wake of the 2008 recession, the state has largely failed to carry out this financial commitment, and it does not now seem possible for the state to ever achieve the agreed upon funding levels as adjusted for inflation).

[155] Black, *supra* note 20, at 384. In more recent *CFE* decisions—centered on the state's continued failure to pay out the Foundation Aid it was originally ordered to pay out in 2006—the New York courts have clarified that they will review evidence of deficient "outputs", but only as evidence of deficient inputs. *See, e.g.*, Maisto v. State, 64 N.Y.S.3d 139, 143 (2017) (explaining that courts may review outputs—namely, student achievement—as evidence of a causal link to prove that inputs are inadequate and that greater inputs would improve student learning); Maisto v. State, 149 N.Y.S.3d 599, 604 (2021) (explaining that the first element of an adequacy violation is a causal link between constitutionally inadequate inputs and deficient outputs such as graduation rates or test scores; without an input deficiency within the narrow scope reviewable, no such causal link can exist).

[156] Black, *supra* note 20, at 384; Kagan, *supra* note 135, at 2275 n.183 (explaining that at the end of the trial court's seventy-six page opinion in *CFE,* the trial court had ordered the state to study the impact that racial segregation was having on

The education article as currently construed and applied is entirely unsuited to addressing New York's worst-in-the-nation school segregation crisis.[157] New York's courts have spoken: the state's segregation crisis is not justiciable. For the state courts to serve as a hammer in the toolbox of students, parents, and advocates, the state's obligations for providing an "adequate" education must be raised and reimagined.

## IV. UNDERSTANDING THE NEW YORK STATE EDUCATION ARTICLE THROUGH A NATIONAL LENS

To properly envision a reimagined education article for New York, it is important to contextualize the current language within the national landscape. While the US Constitution has no explicit protection for education,[158] at least forty-eight state constitutions have a clause or article that explicitly safeguards public education.[159] The language in these education articles varies widely, but generally, the more specific and clear the language, the stronger the predicate for plaintiffs seeking to use litigation under an education article as a tool for reform.[160] The linchpin to state education article litigation is "adequacy."[161]

Adequacy claims under any given state's education article—whether challenging funding, segregation, or otherwise—require state courts to first define the scope and standard for adequacy that a given education article requires and then to determine if the state has met that standard.[162] Common education article language includes phrases such as "thorough" and "efficient," "ample" and "open," "uniform" and "general."[163] State courts have in turn interpreted these phrases,

---

the quality of education statewide. The Court of Appeals omitted this command from its remedial order though, and in *Paynter*—decided the same day as *CFE*—wrote that racial isolation and segregation has no relation to the objectives of the education article.).

[157] *See* Alajbegovic, *supra* note 14, at 324.

[158] *Educational Equity and Quality:* Brown *and* Rodriguez *and Their Aftermath*, COLUM. UNIV.: OFF. OF THE PRESIDENT, https://president.columbia.edu/content/educational-equity-and-quality-brown-and-rodriguez-and-their-aftermath [https://perma.cc/SJA4-CSSX].

[159] *Id.*

[160] *See id.*; *see also* David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown (but How It Can Get Us Closer)*, 2014 MICH. ST. L. REV. 575, 603–04 (2014) (describing the process of state courts weighing adequacy cases: "If the bar is set too low, it renders the constitutional duty of providing an adequate education meaningless. If the bar is set too high, it may become judicially unmanageable.").

[161] Kagan, *supra* note 135, at 2274.

[162] Hinojosa & Walters, *supra* note 160, at 603–604.

[163] *Id.* at 604; INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION 7–8 (2008) [hereinafter DESKBOOK OF STATE CONSTITUTIONS ABOUT

creating unique definitions of educational adequacy.[164] These definitions typically include some set of "goals" (such as civic participation) reached by requiring specific input requirements (such as adequate facilities and textbooks).[165] Crafting a remedy can be relatively straightforward, as a court simply requires the state to remedy whatever was deemed inadequate by making it adequate.[166] Critically, because education articles "place responsibility on the state," adequacy claims give litigants the right to target "state power over school districts."[167]

A revolutionary case brought in Kentucky state court in 1989 sent a charge through the education litigation landscape, underscoring the incredible power of education article suits.[168] The Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*, declared the entire state school system to be in violation of the state's education clause—or inadequate.[169] Most critically, the court did not merely direct the legislature to provide an "efficient" system of common schools as the state constitution provides; rather, the court enumerated seven specific requirements—known now as the "*Rose* factors"—that the state must meet to provide a constitutionally adequate education.[170] In so doing, the court provided the legislature with both the framework and the political "nerve" to make necessary changes.[171] While the *Rose* case did not specifically target segregation, it set a template for sweeping state-based education cases with the incredible specificity of the remedial order and its

---

EDUCATION], https://www.pubintlaw.org/wp-content/uploads/2012/04/EDU_50State.pdf [https://perma.cc/8R7D-PCM7].

164 Kagan, *supra* note 135, at 2273.

165 *See id.*

166 *Id.* at 2272.

167 *Id.* at 2273.

168 *See* Hilbert, *supra* note 13, at 32.

169 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 214 (Ky. 1989); Hilbert, *supra* note 13, at 32–33.

170 *Rose*, 790 S.W.2d at 212 ("[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."); Rebell, *supra* note 154, at 1910–11.

171 Hilbert, *supra* note 13, at 55.

historic scope in declaring an entire state education system unconstitutional.[172]

Equally groundbreaking was *Sheff v. O'Neil*, decided by the Connecticut Supreme Court in 1996.[173] There, in ruling that both de jure and de facto segregation in Hartford public schools was a violation of the state education clause, Connecticut's highest court set off what many thought would be a groundbreaking new wave in education clause litigation.[174] Most vitally, *Sheff* demonstrated that the right to a constitutionally *adequate* education "need not be defined solely in monetary terms."[175] For the state of Connecticut, *Sheff* established that educational adequacy required eliminating extreme segregation, a remedy having nothing to do with monetary inputs.[176] Unfortunately for other states, and momentum for state adequacy claims nationally, the ruling was tied to unique language in Connecticut's Constitution explicitly barring "segregation or discrimination," not common to other state constitutions.[177] In total, in establishing that segregated schools are constitutionally inadequate regardless of the cause, Connecticut made clear that states can indeed tackle de facto segregation and go well beyond the baseline set by *Brown*.[178] To do so, state courts simply need the constitutional language upon which to act.

The right to an adequate education certainly ought to include an education free from intense segregation,[179] but constitutional amendments are needed in New York State to realize that. One commentator, grouping state education articles and clauses into four categories, puts New York's articles in the weakest "bare minimum" category.[180] Another writes that New York's "laconic language . . . does not describe the level of

---

[172] *Id.* at 32; *see also* Rebell, *supra* note 154, at 1910 (explaining that "some courts"—here, the Kentucky Supreme Court—have gone further than New York in enumerating the specific skills that students will need to acquire to be productive citizens and workers, as required by the Kentucky State Constitution).

[173] Hilbert, *supra* note 13, at 39; *see also* Sheff v. O'Neill, 678 A.2d 1267 (1996).

[174] *See* Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y, 346, 355 (2018).

[175] Will Stancil & Jim Hilbert, *Justiciability of State Law School Segregation Claims*, 44 MITCHELL HAMLINE L. REV. 399, 423 (2018).

[176] *See id.*

[177] CONN. CONST. art. 1, § 20; Black, *supra* note 20, at 384 (explaining that the "holding [in *Sheff*] is not easily transferrable to other states because the court's theory was tied to an idiosyncratic constitutional clause").

[178] Hilbert, *supra* note 13, at 12.

[179] *Id.* at 20.

[180] Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 334–39 (1991).

education that must be provided."[181] Calling simply for the "maintenance and support" of "free common schools," the New York State language lacks the much stronger requirement, for instance, of "thorough and efficient" education.[182] Courts are limited to this language in shaping the parameters of "adequacy," and so the more emphatic the education article language, the more plaintiffs can utilize adequacy suits to pursue remedies that attack segregation.[183] New York must work to heighten its standard of adequacy by amending its education article and explicitly ensuring that unreasonably segregated schools are constitutionally inadequate.

### *A. A Model for Action and Reform: Active Litigation in New Jersey and Minnesota*

Promising litigation challenging school segregation in both New Jersey and Minnesota provides a roadmap for what adequacy suits could look like in New York with an amended education article. The constitutions in both states require the state to provide a "thorough and efficient" system of public schools.[184] While neither suit has yet been resolved, courts in both states have ruled the isolated challenges to school segregation justiciable under their respective education articles.[185]

New Jersey also has a constitutional provision explicitly banning segregation in public schools,[186] formally eliminating the distinction between de jure and de facto segregation.[187] As a result, when some form of state action can be demonstrated, even "racial imbalance" has been deemed reviewable relative to

---

[181] Kagan, *supra* note 135, at 2261 n.117.

[182] *See* McUsic, *supra* note 180, at 311, 324.

[183] Brown *and* Rodriguez *and Their Aftermath, supra* note 158.

[184] N.J. CONST. art. VIII, § 4, ¶ 1; MINN. CONST. art XIII, § 1.

[185] *See generally* John Mooney, *'Far Reaching' School Segregation Lawsuit Kicks off in Trenton*, NJ SPOTLIGHT (Jan. 13, 2020), https://www.njspotlight.com/2020/01/far-reaching-school-segregation-lawsuit-kicks-off-in-trenton/ [https://perma.cc/RM6T-E56S] (in clearing a case challenging school segregation in New Jersey to move ahead to discovery, Superior Court Judge Mary Jacobson stated that the statistics were "indisputable" and that the parties should prepare for a lengthy discovery and trial process); Cruz-Guzman v. State, 916 N.W.2d 1, 10 (Minn. 2018) (finding that the school segregation claims brought under the Minnesota Constitution are indeed justiciable).

[186] N.J. CONST. art. VIII, §4, ¶1; N.J. CONST. art. I, § 5; *see* Rachel M. Cohen, *New Jersey Is Getting Sued Over School Segregation*, BLOOMBERG (Jan. 3, 2019, 2:34 PM), https://www.bloomberg.com/news/articles/2019-01-03/a-lawsuit-challenges-new-jersey-on-school-segregation [https://perma.cc/4UGQ-79J7].

[187] Booker v. Bd. of Educ. of Plainfield, 212 A.2d 1, 6 (N.J. 1965) ("It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors.").

the "thorough and efficient" language in the New Jersey Constitution.[188] In the present suit, plaintiffs—representing a class of public school students across New Jersey—allege that the state has been complicit in perpetuating segregation by implementing laws and policies that require students to attend public schools in the municipalities where they live, even when neighborhoods are known to have deep segregation.[189]

It remains uncertain whether the parties will settle, but the plaintiffs' case has survived a motion to dismiss, and the presiding judge has described the data presented on segregation statewide as "indisputable."[190] Plaintiffs are seeking an injunction on the exclusive use of geographic boundaries as the means of assigning public school students to given schools, and are requesting the court order the state legislature to create a methodology to address racial segregation across the New Jersey school system.[191] In New York, in stark contrast, claims of academic failure caused by segregation have been found insufficient to even state a cause of action.[192]

Equally promising litigation is presently moving forward in Minnesota, where, as in New Jersey, the state Constitution requires a "thorough and efficient" system of public schools.[193] A class of plaintiffs enrolled in Minnesota public schools brought an adequacy action under the education article, arguing that "hyper-segregat[ion]" in their schools yields significantly worse academic outcomes.[194] Plaintiffs argue that the state has contributed to the segregation of schools through boundary decisions for attendance areas, use of federal and state

---

[188] *See, e.g.*, *In re* North Haledon Sch. Dist., 854 A.2d 327, 336 (N.J. 2004) ("We consistently have held that racial imbalance resulting from de facto segregation is inimical to the constitutional guarantee of a thorough and efficient education."); *see also* Jenkins v. Township of Morris Sch. Dist., 279 A.2d 619, 631 (N.J. 1971) (holding that the Education Commissioner has the "obligation to take affirmative steps to eliminate racial imbalance, regardless of its causes.").

[189] Amended Complaint at ¶ 1, Latino Action Network v. State of New Jersey, MER-L-001076-18 (N.J. Sup. Ct. L. Div. Aug. 2, 2019) [hereinafter Latino Action Network Complaint]; *see also id.* ¶ 24 (explaining that 24.8 percent of "Black public school students" attended schools that were more than 99 percent nonwhite in the 2016—2017 academic year, and another 24.4 percent attended schools with student populations between 90 percent and 99 percent nonwhite).

[190] Mooney, *supra* note 185.

[191] Latino Action Network Complaint, *supra* note 189, ¶ 79.

[192] Black, *supra* note 20, at 383.

[193] Cruz-Guzman v. State, 916 N.W.2d 1, 7 (Minn. 2018); MINN. CONST. art XIII, § 1.; Hilbert, *supra* note 13, at 46 (explaining that "*Cruz-Guzman* is the most recent in a limited series of educational-adequacy cases committed exclusively to restoring the promise of *Brown*").

[194] *Cruz-Guzman*, 916 N.W.2d at 6 (plaintiffs also brought claims under the equal protection and due process clauses of the state constitution); Weishart, *supra* note 174, at 392 (explaining that "*Cruz-Guzman* resumes a prior legal challenge to segregated schools, *Minneapolis NAACP*, that previously settled in *Sheff's* wake").

desegregation funds for other purposes, and failure to implement effective desegregation remedies.[195] Plaintiffs allege that these actions have caused educational outcomes that are inadequate relative to the Supreme Court of Minnesota's interpretation of the "thorough and efficient" standard.[196] As such, the plaintiffs are seeking both "declaratory and injunctive relief compelling [the state to provide] 'an adequate and desegregated education.'"[197]

Most vitally, just as in New Jersey, the Minnesota Supreme Court has ruled all claims justiciable and has remanded for review.[198] By deeming plaintiffs' adequacy claims, predicated solely on hyper-segregation, to be reviewable on the merits, the court has sent a powerful message: under the "thorough and efficient" requirement of the state's education article, certain degrees of segregation present a constitutional inadequacy that the state can be held accountable for.[199]

While no state has yet established a perfect model for shaping integration remedies through education article litigation, it is clear that New York's education article, as currently construed, is "a dead end."[200] The "wave" of adequacy suits targeted at integration is still relatively new, with model litigation strategies still evolving.[201] New York must act with urgency in working to draw from the imperfect early victories in Kentucky and Connecticut, and the promising litigation in New Jersey and Minnesota which—in surviving summary judgment—have already progressed beyond any comparable suit in New York.[202] There is a groundswell of organizing and youth-led activism in New York right now, and if nothing else, the mere promise of a justiciable claim could provide enormous leverage to those working to shape policy outside the courts.[203] Amending the education article to mirror the "thorough and efficient" clauses of New Jersey and Minnesota, and to draw from the

---

[195] *Cruz-Guzman*, 916 N.W.2d at 5–6.

[196] *Id.*

[197] Weishart, *supra* note 174, at 392 (quoting Cruz-Guzman v. State, 892 N.W.2d 533, 535 (Minn. App. 2017)).

[198] *Cruz-Guzman*, 916 N.W.2d at 12, 15.

[199] Christie Geter, *Let's Try This Again, Separate Educational Facilities Are Inherently Unequal: Why Minnesota Should Issue a Desegregation Order and Define Adequacy in 'Cruz-Guzman v. State'*, 38 LAW & INEQ. 165, 179–80, 195 (2020).

[200] Alajbegovic, *supra* note 14, at 313, 324.

[201] Hilbert, *supra* note 13, at 32, 34.

[202] Black, *supra* note 20, at 382–84.

[203] *See generally IntegrateNYC—Building School Integration and Education Justice*, *supra* note 9 (highlighting the work of student advocates actively fighting for greater equity and justice in New York schools).

specificity of language used in Kentucky and Connecticut, could provide the vital opening for judicial intervention.

## VI. REIMAGINING NEW YORK'S EDUCATION ARTICLE

New York State must embrace the potentially enormous power of its education article, drawing from the example of other states where plaintiffs have been able to use the state court system as a bludgeon in the fights for greater justice and equity in education. An education article that gives rise to justiciable claims challenging deep segregation is a tool that can transcend forces ranging from politics to bigotry, and it is a tool that can be wielded by all, without regard to race or class.[204] Unfortunately, the New York State education article has been read to ensure that each student receives only adequate "inputs" of teaching, equipment, and modern curriculum.[205] A stronger, more precise education article could allow plaintiffs to seek far broader remedies beyond minimally adequate physical resources and funding.[206] Further, a revised education article can ensure the standard of adequate education incorporates the overwhelming, contemporary evidence linking segregated schools and inadequate education.[207] New York must allow its courts to enter this fight.

This note proposes the following language as a reimagined New York State Education Article (Art. XI, § 1):

> The legislature shall provide for a *thorough, efficient, and equitable* system of free common schools, wherein all the children of this state *shall* be educated *in a reasonably integrated learning environment*.

The primary objectives of this proposed language are twofold: (1) to utilize the heightened "thorough and efficient" standard for constitutional adequacy seen in both Minnesota and New Jersey; and (2) to ensure "reasonably integrated" schools are codified as an input requirement of adequate schools, as seen in the Connecticut Constitution.[208]

In using the "thorough and efficient" language from Minnesota and New Jersey, plaintiffs will have the opportunity

---

[204] *See* Hilbert, *supra* note 13, at 55 (describing how the Kentucky Supreme Court was able to give the state legislature the political "nerve" to make otherwise difficult decisions around education policy).

[205] Paynter v. State, 797 N.E.2d 1225, 1228 (2003).

[206] Kagan, *supra* note 135, at 2272.

[207] *See* Geter, *supra* note 199, at 199.

[208] Black, *supra* note 20, at 387–88 (explaining that Connecticut has a "unique constitutional clause" providing: "No person shall be denied the equal protection of the law *nor be subjected to segregation* or discrimination.").

to shape judicial interpretation around those existing favorable interpretations.[209] While the litigation in those states is still ongoing, the "thorough and efficient" language has already been shown to require far more of the state than New York's existing language of "maintenance and support." Courts in both Minnesota and New Jersey have found allegations of segregation alone to be enough for plaintiffs to raise an education article claim, something that has not been achieved in New York.[210]

Further, in replacing "maintenance and support,"[211] the court will be required to begin anew in crafting a contemporary standard for what adequacy under the education article requires.[212] This will provide an opportunity for plaintiffs to shape an understanding of a "thorough and efficient" education that makes use of the overwhelming research tying integrated learning environments with improved outcomes.[213] Plaintiffs will be able to argue that any twenty-first century constitutional amendment calling for a "thorough, efficient, and equitable" system of schools must make use of the twenty-first century research.[214]

With respect to redefining adequacy around the "thorough and efficient" standard, the amendment could even go further, borrowing from the Kentucky Supreme Court in *Rose*, by enumerating more specific criteria for an "efficient" system of schools.[215] In sum, the proposed language presents a powerful opportunity to redefine adequacy based off a contemporary "thorough and efficient" standard.

Beyond allowing litigants and the court to reshape the decades old definition of adequacy, the proposed amendment is explicit that reasonably integrated schools are a required element of constitutionally adequate schools. This specificity

---

[209] *See* DESKBOOK OF STATE CONSTITUTIONS ABOUT EDUCATION, *supra* note 163, at 7.

[210] *See* Mooney, *supra* note 185; *see also* Cruz-Guzman v. State, 916 N.W.2d 1, 8–9, 15 (Minn. 2018).

[211] N.Y. CONST. art. XI, § 1; 94 N.Y. JUR. 2d *Schools, Universities, and Colleges* § 9, *supra* note 18 (explaining that the courts shaped the protection afforded by the current "maintenance and support" language to require students be provided with the opportunity for a "sound basic education" that provides minimally adequate facilities, equipment and curriculum); Note, *The Misguided Appeal of a Minimally Adequate Education*, 130 HARV. L. REV. 1458, 1465 n.61 (2017) (underscoring that the New York Court of Appeals has made clear that the protections of a "sound basic education" cannot be extended to guard against school segregation).

[212] Hinojosa & Walters, *supra* note 160, at 603.

[213] Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* NAT'L RSCH. COUNCIL, ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 230–31 (Timothy Ready et al. eds., 2002).

[214] *See* Jason, *supra* note 49, at 166.

[215] Hilbert, *supra* note 13, at 33.

draws directly from both Connecticut and New Jersey, where their respective constitutions are among the few to explicitly bar segregation in schools independent of cause.[216] This is designed to guarantee that the court does not again take a narrow read—currently limited effectively to staffing and resources—on the required inputs for an adequate education.[217]

As discussed, the New York Court of Appeals in *Paynter* dismissed plaintiffs' claims challenging segregation in Rochester schools merely because extreme segregation and poor educational outcomes were not linked to any constitutionally required input of a minimally adequate education.[218] Through specifically requiring reasonable integration in the proposed amendment, such segregation would be a constitutional inadequacy. Put another way, claims challenging hyper-segregation in New York have not been dismissed because they are any less "indisputable"[219] than similar claims in New Jersey or Minnesota, but instead because racial segregation has been found to have "no relation to the discernible objectives of the [New York State] Education Article."[220] Under the proposed language, anything short of a "reasonably integrated learning environment" will mean the state has failed to adequately provide a "thorough" and "efficient" system of schools.

Finally, the proposed language makes reference to an "equitable system" that is "reasonably" integrated in an effort to allow the courts a degree of flexibility in crafting and approving remedies that account for distinctions in the demographic composition of given regions.[221] Ultimately, where the line is drawn on the degree of segregation or racial isolation in a school is a question the courts, litigants, and the legislature will need to grapple with.[222] In helping shape these thresholds though, plaintiffs here should make full use of contemporary research analyzing the "critical mass" of same-race/ethnicity peers shown

---

[216] *See* CONN. CONST. art. 1, § 20; N.J. CONST. art. 1, § 5; *supra* Part IV.

[217] Black, *supra* note 20, at 384.

[218] *See supra* Section III.C.

[219] Mooney, *supra* note 185.

[220] Paynter v. State, 797 N.E.2d 1225, 1230 (N.Y. 2003).

[221] *See* Jason, *supra* note 50, at 162, 183 (explaining that "universal proposals may expend precious political capital without creating equitable outcomes" and that funding adequacy suits in New York have "lacked meaningful tools for equity" in that they have failed to use "statewide reform as an opportunity to close performance gaps").

[222] TRACTENBERG & COUGHLIN, *supra* note 19, at 68 (explaining, in the context of New Jersey, that "[a] threshold question as to the plan's goals is where the line should be drawn between adequate racial or socioeconomic 'balance' and 'segregation.'" The authors note that in Connecticut, in implementing the landmark 1995 *Sheff* decision, a rough benchmark was used: "a school is deemed segregated if more than 75% of its students are black and Hispanic.").

to help maximize both the academic and socioemotional benefits of integrated classrooms.[223] As noted previously, the National Research Council recommends learning environments with a representation threshold of 15 percent to best mitigate feelings of isolation that can hinder learning.[224] The proposed language of "equitable" and "reasonable" is designed to avoid binding the courts or litigants to any specific integration target, while ensuring that modern research is accounted for in admissions policies and court ordered remedies.

All in all, the amendment proposed in this note is intended to ensure that anything short of reasonable integration will present a constitutionally actionable inadequacy that is attributable to the state. The proposed language is designed to spur the court to redefine adequacy through the more favorable frame of a "thorough and efficient" system of schools, with the requirement of reasonably integrated schools stated explicitly. A more precise education article, as proposed here, could allow plaintiffs to seek far more creative remedies—namely, various models for integration of schools—beyond adequate physical resources.[225] It is ultimately the courts that will define what new educational opportunity in the state could look like,[226] but as in New Jersey and Minnesota, plaintiffs will have the opportunity to seek declaratory and injunctive relief requiring the state legislature to model integration plans that meet the unique needs of a district or region.[227] In New York State, the responsibility to provide a constitutionally adequate, sound, basic education does not fall to local municipalities or districts; rather, it falls squarely to the state.[228] Parties could bring suits challenging segregation in individual districts, or across multiple districts, and the state would carry the burden of establishing a remedy to reasonably address the inadequacy.[229] As illustrated originally by the Kentucky Supreme Court in *Rose*, state courts have incredibly broad remedial power in adequacy suits, such that they can invalidate large pieces of state education systems, or even entire systems.[230]

No single policy change is a panacea, but sufficiently integrated schools are well proven to bring more equitable and

---

[223] *See supra* note 69 and accompanying text.
[224] *See supra* Part II.
[225] Kagan, *supra* note 135, at 2272.
[226] Weishart, *supra* note 175, at 400.
[227] *Id.* at 392.
[228] Kagan, *supra* note 135, at 2277.
[229] *Paynter*, 797 N.E.2d at 470 (noting that "[i]t should not be assumed" that the "only remedy would entail the forced busing of students").
[230] Hilbert, *supra* note 13, at 32.

progressive learning outcomes for all students.[231] If New York is truly "on track to reclaim the mantle of progressive leader," as pundits have suggested, it must grapple head on with the dark cloud of inequity and segregation hovering over the 2.6 million public school students in its care.[232] In light of its worst-in-the-nation segregation crisis,[233] New York must respond and redefine the standard of an adequate education. The New York State Constitution has been amended over two hundred times since 1894, the same year that the current education article language was adopted.[234] It now must be amended again.

Nevertheless, there are a number of legitimate concerns with bringing courts into any fight over the nuances of education policy. It is the same state courts who commonly cite to concerns of local control, separation of powers, and judicial competency when wading into education matters, that will be made to breathe specific meaning into new education article language.[235] In contemplating the role courts should be allowed to play in defining the nuances of a minimally adequate education, some argue that both institutional competency and lack of political accountability weigh strongly in favor of judicial restraint.[236] Further still, judicial intervention can be "too blunt of an instrument" in an area that calls for careful calibration.[237]

This said, there is good reason that scholars are urgently pushing for a new wave of litigation that seeks remedies beyond money, and the courts alone can meet that call.[238] Largely untouched by *Brown*, the Northeast, including New York State, has had more than six decades of opportunity for its policymakers and administrative agencies to try to tactfully integrate its schools. Unfortunately, segregation has only grown worse.[239] Of course, much of the blame here falls to the powerful forces of politics, bigotry, and fear that too often monopolize

---

[231] Jason, *supra* note 49, at 166.

[232] Wang & McKinley, *supra* note 1.

[233] *See supra* Introduction.

[234] Protections in the New York State Constitution, *supra* note 75, at 6.

[235] Note, *Education Policy Litigation as Devolution*, 128 HARV. L. Rev. 929, 930 (2015); *see also* Elizabeth A. Harris, *Connecticut Supreme Court Overturns Sweeping Education Ruling*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/nyregion/connecticut-supreme-court-education-funding.html [https://perma.cc/V2EK-7Z8P] (In 2018 Connecticut State Supreme Court ruling, the chief justice wrote: "It is not the function of the courts, however, to create educational policy or to attempt by judicial fiat to eliminate all of the societal deficiencies that continue to frustrate the state's educational efforts.").

[236] *The Misguided Appeal of a Minimally Adequate Education*, *supra* note 211, at 1458.

[237] *Id.* at 1459.

[238] Weishart, *supra* note 174, at 346.

[239] *See supra* Introduction.

education policy decisions, but a constitutional predicate to challenge segregation in courts could transcend those pressures. Further, the arrival of the courts by no means precludes local districts and state education officials from working hastily to adapt their admissions and zoning policies, and in fact, the threat of litigation may help catalyze such work.[240] Opening the state courts simply gives advocates another pathway to effect substantive change.

Finally, and perhaps most critically, physical desegregation of schools alone is far from a "magic bullet to end the achievement and opportunity gaps."[241] Above all else—unlike so often in the past in New York—it is imperative that the expectations and desires of families for whom the system has worked against are centered.[242]

## CONCLUSION

New York State needs bold action to tackle the segregation that dominates its school system. School segregation is not an issue that will naturally recede, in fact, the crisis only grows more intense.[243] Achieving structural change with truly equitable outcomes will no doubt require expenditure of "precious political capital," but bold reforms—in this case, reshaping the New York State education article—must be pursued.[244] *Brown v. Board of Education* may have had limited impact in the North, but this reality is not a cover for New York and its courts to hide behind.[245] It is long past time for New York's courts, and the sweeping power of educational adequacy suits, to be brought into the fight for greater equity and integration. New York's schools have been in the iron grip of segregation for decades; providing parents, students, and advocates with a key to the state court doors could finally break this hold.

---

[240] Hilbert, *supra* note 13, at 55.

[241] Theoharis, *supra* note 55; *see also Joint Hearing on School Segregation*, *supra* note 109 (written testimony of the New York Civil Liberties Union and the American Civil Liberties Union) ("Meaningful and purposeful school integration goes beyond placing students of different races/ethnicities, ability or performance in school with one another. The pursuit of physical desegregation alone is insufficient to deeply integrate cultures, values, and lived experiences.").

[242] Jason, *supra* note 49, at 9.

[243] Theoharis, *supra* note 55.

[244] Jason, *supra* note 49, at 162.

[245] Hinojosa & Walters, *supra* note 160, at 582 (noting that *Brown* "operated as the icebreaker" but remains an "unfulfilled promise . . . that the public can ill afford to abandon").

*Gus Ipsen*†

† J.D. Candidate, Brooklyn Law School, 2022; B.A. Lehigh University, 2014. Thank you to Kellie Van Beck, Crystal Cummings, Aidan Mulry, Sam Coffin, and the entire *Brooklyn Law Review* staff for your invaluable edits, organization, and encouragement. Thank you to Jenny, Mom, and Dad for challenging me, being patient with me, and supporting me always. Of course, thank you, Amelia.

## Applicant Details

| | |
|---|---|
| First Name | **Aaron** |
| Middle Initial | **M** |
| Last Name | **Jacobs** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **amj2194@columbia.edu** |
| Address | **Address**<br>Street<br>**417 W. 47th St. Apt. 6W**<br>City<br>**New York**<br>State/Territory<br>**New York**<br>Zip<br>**10036**<br>Country<br>**United States** |
| Contact Phone Number | **6105474961** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **University of Virginia** |
| Date of BA/BS | **May 2017** |
| JD/LLB From | **Columbia University School of Law**<br>**http://www.law.columbia.edu** |
| Date of JD/LLB | **May 15, 2022** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Columbia Human Rights Law Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **National Native American Law Student Moot Court Competition** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Lloyd, Ed
elloyd@law.columbia.edu
212-854-4376

Barenberg, Mark
barenberg@law.columbia.edu
212-854-2260

Heller, Michael
mhelle@law.columbia.edu
212-854-9763

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Aaron Jacobs
512 W. 112th St. Apt. 4D
New York, NY 10025
(610) 547-4961
amj2194@columbia.edu

March 1, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
500 Pearl Street, Room 701
New York, NY 10007

Dear Judge Liman:

I am a third-year student at Columbia Law School, and I write to apply for a one-year clerkship in your chambers beginning in 2024. After I graduate, I will begin my career as an Associate at Kramer Levin Naftalis & Frankel LLP in New York City.

Enclosed please find a resume, law transcript, undergraduate transcript, and writing sample. Also enclosed are letters of recommendation from Professors Michael Heller ((212) 854-9763, mhelle@law.columbia.edu), Mark Barenberg ((212) 854-2260, barenberg@law.columbia.edu), and Edward Lloyd ((212) 854-4376, elloyd@law.columbia.edu).

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Aaron Jacobs

# AARON JACOBS

512 W. 112th St. Apt. 4D, New York, NY 10025 · (610) 547-4961 · amj2194@columbia.edu


## EDUCATION

**Columbia Law School,** New York, NY
J.D. expected May 2022
Honors: James Kent Scholar
Publications: "Distressed Drivers: Solving the New York City Taxi Medallion Debt Crisis," *Columbia Human Rights Law Review Online*, (forthcoming in early-2022)
Activities: *Columbia Human Rights Law Review*, 3L Online Editor, 2L Staff Editor
Research Assistant to Professor Mark Barenberg (Fall 2021)
American Civil Liberties Union, 2L Vice President of Events, 1L Representative
Student Animal Legal Defense Fund, 3L Representative, 2L Vice President, 1L Representative
Native American Law Students Association, 2L Treasurer
Environmental Law Society, 2L Board Representative
Native American Law Students Association National Moot Court Competition, 1L Competitor

**University of Virginia**, **Batten School of Leadership and Public Policy,** Charlottesville, VA
B.A., *graduated with highest distinction*, received May 2017
Majors: (1) Government and (2) Leadership & Public Policy
Activities: University Committee on Names and Renaming, Student Representative
Alpha Phi Omega Community Service Organization, Treasurer
Memorial Gymnasium, Facility Supervisor
Thesis: "The Structure of Machine Politics in Virginia, 1930-1965: An Analysis of Harry Byrd"

## EXPERIENCE

**Kramer Levin Naftalis & Frankel LLP,** New York, NY
*Summer Associate (return offer accepted)* May – July 2021
Researched and drafted memoranda on issues relating to employment discrimination, bankruptcy, and tort claims. Assisted in due diligence for two real estate transactions. Contributed to a published article on recent changes in takings law. Successfully secured dismissal for a pro bono client in a matter regarding Child Protective Services.

**Columbia Environmental Law Clinic,** New York, NY
*Student Attorney* January – May 2021
Represented and liaised with two clients. Drafted and submitted comments to a state agency in opposition to an industrial polluter's permit application. Contributed to an *amicus brief* arguing for the importance of protecting clean water resources from toxic pollutants. Presented oral comments at a public hearing.

**Brooklyn District Attorney's Office,** Brooklyn, NY
*Prosecution Extern* September – December 2020
Drafted four motions to compel DNA from homicide and felony defendants. Wrote research memoranda about warrantless police searches and admissibility of an interrogation for a suppression hearing. Compiled information from 911 phone calls and transcribed defendant's recorded statements. Reviewed police investigation documents to compile three extensive witness lists. Interviewed witnesses and victims to discover case facts.

**New York Legal Assistance Group,** New York, NY
*Foreclosure Prevention Project & Taxi Assistance Project Summer Legal Intern* June – August 2020
Conducted over 15 intakes for clients regarding mortgage, taxi medallion, or COVID-19 related issues. Wrote research memoranda relating to a client's submission of a late answer, medallion loan security agreements, and due process considerations in remote proceedings. Reviewed foreclosure documents from clients.

**INTERESTS:** Playing trombone and piano, vegan cooking, re-watching *Seinfeld* and *The Office*

Columbia
Law School

**Registration Services**

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

02/04/2022 14:48:40

Program: Juris Doctor

## Aaron Mayer Jacobs

**Spring 2022**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L9325-1 | Computers, Privacy and the Law | Moglen, Eben | 2.0 | |
| L6354-1 | Drug Product Liability Litigation | Arnold, Keri; Grossi, Peter; O'Connor, Daphne | 2.0 | |
| L6252-1 | Family Law | Godsoe, Cynthia | 3.0 | |
| L6655-2 | Human Rights Law Review Editorial Board | | 1.0 | |
| Y4350-1 | PIANO INSTRUCTION:NON-MAJORS | | 0.0 | |
| L9172-1 | S. Advanced Trial Practice | Heatherly, Gail | 3.0 | |

**Total Registered Points: 11.0**

**Total Earned Points: 0.0**

**Fall 2021**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L6231-1 | Corporations | Judge, Kathryn | 4.0 | B+ |
| L6655-2 | Human Rights Law Review Editorial Board | | 1.0 | CR |
| Y4350-1 | PIANO INSTRUCTION:NON-MAJORS | | 0.0 | A+ |
| L6330-1 | S. Native American Law [ Minor Writing Credit - Earned ] | Benally, Precious Danielle; McSloy, Steven | 2.0 | B+ |
| L9175-1 | S. Trial Practice | Heatherly, Gail | 3.0 | A |
| L6685-1 | Serv-Unpaid Faculty Research Assistant | Barenberg, Mark | 2.0 | A |

**Total Registered Points: 12.0**

**Total Earned Points: 12.0**

**Spring 2021**

| Course ID | Course Name | Instructor(s) | Points | Final Grade |
|---|---|---|---|---|
| L9257-1 | Environmental Law Clinic | Lloyd, Edward | 7.0 | A |
| L6355-1 | Health Law | Underhill, Kristen | 4.0 | A+ |
| L6655-1 | Human Rights Law Review | | 0.0 | CR |
| L6274-3 | Professional Responsibility | Gupta, Anjum | 2.0 | A |
| L6683-1 | Supervised Research Paper | Barenberg, Mark | 1.0 | A |

**Total Registered Points: 14.0**

**Total Earned Points: 14.0**